Workers' Compensation Appeals Tribunal

COMPENSATION APPEALS FORUM

Tribunal d'appel des accidents du travail

Workers' Compensation Appeals Tribunal
505 University Avenue, 7th Floor, Toronto, Ont. M5G 1X4
Telephone: (416) 598-4638
Fax: (416) 979-8324

Vol. 3 No. 1 July, 1988

COMPENSATION APPEALS FORUM

Vol. 3, NO. 1 (July 1988)

TABLE OF CONTENTS

Compensation Appeals Forum is a publication of the Workers' Compensation Appeals Tribunal and is available free of charge. The views and opinions expressed herein are those of the authors and do not necessarily represent those of the Tribunal. The contents may not be reproduced in any form without written authorization.

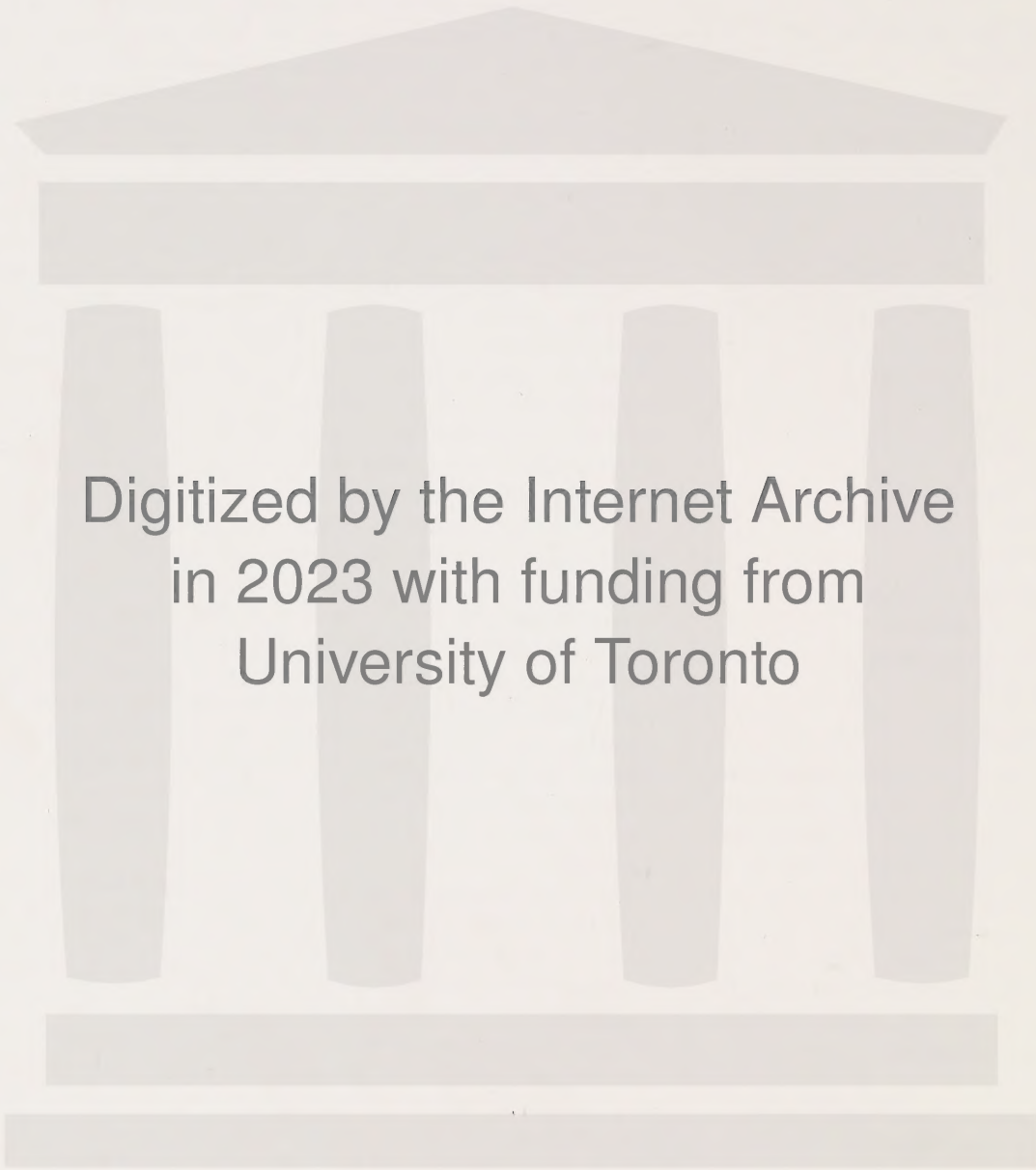
ISSN 0840-4828

From the Editors . . .

Welcome to the fourth issue of the *Compensation Appeals Forum*, published by the Workers' Compensation Appeals Tribunal of Ontario. The Tribunal, under the chairmanship of S. Ronald Ellis, Q.C., determines appeals arising under the Workers' Compensation Act and appeals from decisions of the Workers' Compensation Board of Ontario respecting entitlement to compensation or benefits, and assessments or penalties. It also determines the effect of the Act on workers' rights to take civil action against their employers.

In the *Forum*, we publish analytical comment from our constituencies and other observers concerning the Tribunal's decisions, processes, and general compensation principles related thereto. Our first issue, which was published in October 1986, featured a short history of the Tribunal, and discussions of the role of Tribunal counsel and of some Tribunal decisions concerning psychogenic pain. In the second issue, we were pleased to present six articles ranging from a review of the Tribunal's treatment of the available work issue in *Decision No. 2*, to a more general study of workers' compensation coverage for farm workers. The third issue made available six articles on topics ranging from a review of the Tribunal's industrial disease decisions to limitations on the right to sue in products' liability situations, including critiques of the Three Week Rule and Section 21, a review of the early history of workers' compensation in Ontario, and a discussion of the right to sue executive officers. There were also two shorter "Notes", and a "Letters to the Editors" column. In this issue, we present articles on dilemmas in the adjudication of claims for disease, the Quebec and New Zealand workers' compensation systems, the trend to external appeals, the Tribunal's decisions on spinal disability, and the interpretation of the section on pension supplements. There is also correspondence on whether practicing workers' compensation representatives should be eligible for appointment as Tribunal members.

We invite readers to submit papers, case comments, letters, and replies to articles appearing in previous issues, etc., in French or English, for consideration for publication. We are looking for constructive comments about, or an analysis of, Tribunal decisions and processes, or related general compensation issues. We remind readers that submissions are invited for a special issue of the *Forum* on the topic of legal causation. Please send submissions directly to the Editorial Board, *Compensation Appeals Forum*, Information Department, Workers' Compensation Appeals Tribunal, 505 University Avenue, 7th Floor, Toronto, Ontario, M5G 1X4, telephone (416) 598-4638. Alternatively, you may send your article to us by FAX at 979-8324. Submissions will be reviewed by the Editorial Board, and will not be seen by decision-making members of the Tribunal until they are published. The Editorial Board reserves the right to reject, edit, or condense all submissions, and does not assume responsibility for the loss or return of manuscripts. Copies of the *Forum* may be obtained from the Information Department. We look forward to reading your contribution!



Dilemmas in the Adjudication of Claims for Disease

Terence G. Ison*

This is an edited transcript of an ex tempore presentation given by Professor Ison at a seminar at the Appeals Tribunal on November 25, 1986.

Throughout the history of Workers' Compensation, attitudes to claims for disease have been very different from attitudes to trauma claims. There have been negative pressures in relation to disease which have gone far beyond any pressures that have operated in relation to trauma.

In the early days, there was political debate on whether diseases should be covered at all, and there was pressure for the system to be confined to trauma. In the result, disease was covered in a very confined way at the beginning, with a closed list of diseases. Only gradually did we emerge to the position that any disease resulting from occupation is covered, and even then we did it in a half-hearted way. We had various restrictions — time periods, for example, and the requirement of economic loss. Also, in the drafting of the statutes we covered disease in a rather parenthetical way.

Other factors have contributed as the years have gone by to a negative attitude towards compensation for disease. One has been that in many industries there is no easy way of preventing certain diseases. In mining, in particular, diseases can be constrained or reduced, but they cannot always be prevented. We have never really taken the same view with regard to trauma, which has always been regarded as *prima facie* preventable. Also, the measures to reduce or prevent disease often involve very substantial costs and could sometimes result in the closure of the industry. These economic pressures can create an enormous incentive to deny the existence of a disease, or at least to deny its occupational etiology.

Again, when accidents occur, they are commonly perceived as resulting from something deviational, something exceptional, something that ought not to have happened. Disease often results from what one might call normal industrial processes. The cause is not a deviational event, not an interrupting event, and so there may be some tendency in the industry to perceive the disease as part of a natural order of things. It might be seen, therefore, as not something that somebody should complain about or claim for.

Then, too, the volume of compensation claimed is sometimes taken as an indicator of management efficiency and, perhaps, even to involve a stigma. If exposure to contamination is perceived as something which is not preventable, there may then be a feeling that it is unfair that it should be compensable.

CLAIMS INITIATION

There are also difficulties inherent in the initiation of disease claims. In almost every trauma case, the worker knows in general terms what happened, where it happened, and how it happened. The worker does not usually need a medical opinion to know what the cause of it was. Where diseases are well known in the industry and where the symptoms are obvious to anybody, it is much the same. But many categories of disease are not going to be attributed to employment unless a doctor is of that opinion. So the need for a medical opinion to link the disease and the employment is another screening factor in disease cases that generally does not exist in trauma cases.

Many of the negative attitudes with regard to disease find their way into medical literature, much of it written by company doctors. The medical literature tends to have a negative impact on Compensation Boards in ways which involve a certain circularity. For example, the guidelines used in Ontario purport to be based upon a review of medical literature. But when reading that literature, I found that one of the medical texts on occupational diseases, dealing with latency periods and exposure periods, took as its source the guidelines of the Workers' Compensation Board of Ontario. In some situations, a sort of conventional wisdom grows up, which becomes circular and feeds upon itself, and which does not have any adequate research base. It is almost like the way in which the legal profession sometimes builds up a body of case law, by precedent building upon precedent, without external reference points by which to understand the significance of what is going on.

There are other explanations for restraint too, and some of them are more commendable. One is that several of the most serious occupational diseases are incurable. They will inevitably be fatal. In those cases, one can understand a reluctance on the part of attending physicians to come to the conclusion that the claimant has the disease. But even when the motivation is benevolent and praiseworthy, as it obviously is in those situations, the end result is still the same — a tendency to underestimate and to diagnose too late in disease cases.

The result of all these points is under-recognition of the incidence of occupational disease. There is no doubt that only a small minority of the victims of occupational disease actually receive compensation. There is scope for dispute about the figures since available data are sparse and amenable to several interpretations, but it is credible that the proportion of

victims of occupational disease who actually receive compensation could be well below ten percent. It could be higher, but whatever figure one takes, there is no doubt that the majority of the victims of occupational disease do not receive compensation.

ADJUDICATION OF CLAIMS

A negative attitude has pervaded the adjudication of occupational disease claims, very different from any attitude generally found in trauma cases.

One measure of it is the changes of mind that take place. For example, how many situations are there in which the Board has denied a claim for occupational disease and later, sometimes years later, altered that decision and concluded that the disease did result from employment? Quite a significant number. Then ask the converse question: how many cases are there in which the Board has allowed a claim for industrial disease and then later, in response to further medical research or some other development, has come to the conclusion that the disease did not result from employment? I am not sure that there are any. I have never come across one. This contrast is in itself some indication of the cautious, negative approach that I have mentioned.

Clerical Model

Several other factors have interacted here. One is the heavy dependence upon doctors, not for medical opinions, but for what one might call the general resolution of the claim. A phenomenon that has prevailed at the Ontario Board, and commonly at other compensation boards in Canada, is what I would call a clerical model of adjudication, rather than an adjudicative model. There has not been established the principle that the decisions on a claim should be in the hands of somebody who has the ability, the time, and the training to make the decisions on the claim, and to decide the general issue, referring to doctors only for medical advice. That has generally not happened. I am not sure to what extent current changes of the Board may make a difference, but the practice over the years has been for doctors to decide the general issue. File after file would go from adjudicator to doctor without a medical question ever having been identified.

The same thing was happening when I took over the Board in British Columbia. The result was that a large proportion of the opinions of Board doctors would relate to questions that were not relevant, and the opinion, as often as not, would be an opinion on a question of law, not one of medicine. So I established the basic rule in British Columbia that no doctor should ever give any opinion unless and until somebody else, usually the adjudicator, has identified and noted on the file the legally relevant question on which the opinion is needed.

Etiology

What commonly happens in disease cases, particularly with the more serious lung diseases where the issue is etiology, is that after all the evidence has been considered, there is only one question — what assumption should be made in the absence of data? That is anything but a medical question, and yet, time and time again, it is decided by doctors. Related to this, the medical profession has a strong habit of thinking that the absence of positive data requires a negative assumption. That assumption is commonly made by company doctors and Board doctors, and sometimes even by outside consultants or treating doctors. Incidentally, when you are reading a medical report on the etiology of a disease, you can usually make more sense of it if you ignore the ending, because it is in the last sentence, or the last paragraph, where you usually find the legal opinion, an opinion which is (a) unprofessional, and (b) usually wrong. It is in the preceding paragraphs that the adjudicator can often find the medical opinion that is needed.

I recall a case that we had in British Columbia. The outside consultants seemed to have done a good job in analysing the available data, as far as it went. The diagnosis was not all that precise — chronic obstructive lung disease. There was a long history of exposure to mining dusts. The worker was a non-smoker, who had not lived in any area known for high contamination, except for the mining town in which he worked. There was no alternative hypothesis about what might have caused this disease. The case had gone to a panel of three specialists, and their report began frankly by saying that we do not know what the cause of this is. The final paragraph concluded that "there is no evidence that this disease resulted from the employment".

This opinion had been taken at the Board as ground for denying the claim. "There is no evidence that" was read to mean the same thing as "it was not caused by". The Board doctors seemed to be assuming that this phrase justified a negative conclusion. I asked the Board doctor. "What do you think that this phrase actually means? Is it a negative or is it a neutral?" He replied, "What is the difference?" He did not perceive a significant difference between a neutral and a negative because of the ingrained habit of believing that neutrality of the data warranted a negative conclusion. We concluded that the phrase "no evidence" means what it says. Therefore, the only real question was: "What assumption should be made in the absence of data?"

What the consulting doctors seemed to be telling us was that as a matter of medical science, they did not know what caused this disease. That was fine, as far as

I am concerned. It was straightforward, clear, and honest. It told us what the state of medical knowledge was. That is all that we needed them for. We did not need them, or Board doctors, to tell us what assumption should be made as a matter of law or policy following on from that. In the result, we made the best guess that we could about the cause of the disease, and we allowed the claim. The disease could have been caused by the exposure to mining dusts, and the compelling factor was that there was really no alternative hypothesis about how it was caused. The Board doctors felt that we were making a medical decision contrary to the medical evidence, but that was not so. The essential difference between us was that we had decided a question of law contrary to the legal opinion of the Board doctors.

I noticed the same sort of thing in an Ontario case not long ago. It involved a scheduled disease. The worker was in an industry listed in the schedule, so that under the terms of the Act, the presumption applied and the claim should be allowed if there was no evidence to the contrary. But the file had gone to a Board doctor who received it and concluded that, "There is no medical evidence that this disease resulted from that employment". This was interpreted by the adjudicator as a medical opinion that the disease did not result from employment. He then concluded that there was now medical evidence to the contrary. Therefore, the presumption in the schedule was displaced and there was justification for the denying the claim. In that case, there was a lack of any evidence about the cause of the disease in that worker. The Act provided that a positive assumption should apply, but the process of medico-legal interaction at the Board had produced a negative assumption.

Diagnosis

Similarly, opinions on diagnosis often involve a concealed legal element. Take, for example, something like asbestosis. In the extreme case where it has become severely disabling, there may be no difficulty in diagnosis. But asbestosis is not something that suddenly happens overnight. It is progressive. The progression starts with the exposure to the contamination. Then there is the influence, over time, on lung tissue. Then there is some influence on body function, and later a noticeable disability. Finally there is immobility, and then death. At some point in this progression, somebody might apply the diagnostic label and at some point in the progression, somebody might say, "He now has a disability". The selection of those points is not a question of medicine if the purpose of applying the labels is to determine a compensation claim. Doctors are needed to determine what the condition is and what point in the progression has been reached, but they are not needed to decide when the labels should be used that trigger the eligibility for compensation. If the purpose of the inquiry is to determine eligibility for compensation, the question of whether this, whatever it is, is a "disability", is not a medical question. The question of when to apply the label is one of law and policy. For compensation purposes, it does not really matter when a doctor would apply the diagnostic label of asbestosis for other purposes. The fact that a diagnostic label is applied at certain times for some purposes does not require the conclusion that the same diagnostic label ought to be applied at the same time for other purposes.

If a worker has something that might or might not be called asbestosis, and the only doubt is where the worker is on the time dimension, the question of whether to apply the label at the moment is one that ought not to be answered by the doctor. All the doctor can do, as a matter of science, is tell us where the worker is at in the progression of the disease. It then becomes a question of law and policy whether that is going to be called asbestosis, whether the presumptive schedule is going to apply, and whether it is disabling so as to require compensation at that point in time.

Medico-legal Interaction

A large portion of the blame for these problems does not lie on the shoulders of the doctors. Often they are producing medical opinions without having any clear instructions about what the medical opinion is needed for, and what the relevant questions are. I can remember, for example, receiving reports from a Medical Review Panel, with an opinion on diagnosis and etiology when nobody had thought to tell the Panel, in the first place, that the only issue in this case is now prognosis, or vice versa. Because nobody had told the Panel what the legally relevant questions were, they were turning their minds to the wrong questions. Those sorts of extremes are not common nowadays; but it is still common for doctors to be expressing opinions on etiology without any clear identification of the question they are supposed to answer. The result is an unsatisfactory opinion, commonly, stating that the disease was not caused by employment, but without identifying an alternative hypothesis. The question that should be put to the doctor in many of these cases is, "What are the alternative hypotheses about the etiology of this disease and what are the reasons for believing that one is more credible than another?"

What the foregoing discussion also means is that there has to be somebody on the scene, in primary adjudication, to ensure that the legally relevant questions are being carefully identified, that the doctors are advising on the legally relevant questions, and that they confine their advice to questions of

medicine.

Even with regard to questions of medicine, the opinions of Board doctors must be subject to cross-examination. That, incidentally, is one reason why this Tribunal has an advantageous position compared with the Board. It has been a long tradition at the Ontario Board that the opinions of Board doctors are taken at face value and always adopted. For example, there was a comment on pages 2.6 and 2.7 of the 1982 study by Peter S. Barth of *Workers' Compensation and Asbestos in Ontario* that out of 156 industrial disease claims files examined, in only one case did anybody at the Board question the opinion of the Board doctor. In cases of that type, it should have been in something like 110 out of 156 that somebody questioned the opinion of the Board doctor, because if it is never questioned, it is never exposed to scrutiny.

Of course, in many cases when I cross-examined Board doctors on their opinions, I would end up being convinced; but that does not mean that the exercise was useless. It was a way of checking, and often we ended up with a consensus on what the result ought to be. The process was infinitely worthwhile, and it horrifies me to have Board doctors giving opinions which are not subject to cross-examination. That has been one of the failings of the Ontario Board.

One problem has been that it is very difficult in terms of staff morale to cross-examine a Board doctor at a public hearing when you have an internal appeal system. I used to solve that problem by doing it in private. To my mind, it was more important to discover the truth than to adhere to procedural rules designed elsewhere for the adversary system. In any event, these were all situations in which there was no interested party who could be adversely affected by the process of cross-examination. Results were produced that could probably never have been achieved by cross-examining the Board doctor at a hearing. It is part of the down-side of this type of Tribunal that any cross-examination of a Board doctor is going to take place, as far as a doctor is concerned, in public. That makes it very difficult for the doctor to revise, or otherwise to acknowledge the flaws in, his or her opinion.

GUIDELINES

The negative influences that I have mentioned have pervaded the Board in a number of ways, but they probably show most clearly in the development of the guidelines. Quite frankly, I do not like the guidelines. It would be better if they did not exist.

Some of the reasons relate to the content of the guidelines. For example, it has been traditional for the Ontario guidelines to require a "clear and adequate record of exposure". These words are loaded. Where do we find in law any principle that the evidence has to be "clear"? To say that suggests that there is a burden of proving the affirmative, and of doing it in a way that goes beyond the balance of probabilities. What does "adequate" mean? It is a superfluous and therefore misleading word. "Record" is another dangerous word. Does this mean that there is no entitlement to compensation if there is no contemporaneous record of exposure? It is only in a limited range of industries that exposure records are kept; in mining, for example. And even where everybody knows what the worker was exposed to, the records are probably not the most reliable evidence of the extent of the exposure. In demolition work, there have generally been no records of even the types of contaminant to which a worker might have been exposed, and where there is a record, all one can be certain of is that it is going to be unreliable. What one does not know is the extent to which it is unreliable. And, of course, it is difficult to test the veracity of a written record that was composed twenty or thirty years ago.

There are other problems with the guidelines that would remain even if the content were revised. One is that the guidelines tend to divert attention away from, rather than towards, the legally relevant question. Often this is: "What were the causes that have contributed to any disability from which the worker is suffering?" As soon as you start referring to the guidelines, however, you find that they appear to require the determination of a diagnosis. Yet there is nothing in the Act which requires a diagnosis as a precondition of eligibility to compensation. The Act used to require that, but it certainly does not do so now. There are some situations in which it is easier to establish etiology than it is to establish diagnosis, and if etiology can be established, the worker is entitled to compensation, notwithstanding the absence of diagnosis.

What we are talking about here are always probabilities — never certainties, and with regard to etiology, it is often necessary to guess at the best available hypothesis. The adjudicator is diverted from that task by guidelines that seem to demand a specified exposure period and a specified latency period. The guidelines always state that cases falling outside the guidelines shall be considered on their merits, but there have been many complaints that cases falling outside the guidelines are disallowed automatically without further inquiry.

One thing that bothers me here is that one finds cases being disallowed without an alternative hypothesis being developed as to the cause of the disease. One should usually, though not always, reject a negative medical opinion which does not identify an alternative hypothesis, because the function of the Board and the Tribunal is to determine what is the best available hypothesis about the cause of this disease.

One cannot do that without first identifying the alternatives. If a medical opinion says only that: "I do not think this resulted from employment", and does not go on to say what it did result from, that medical opinion is suspect. It should not always be rejected because there are some situations in which one can say that "It didn't result from employment", without specifying what it did result from. But it is a suspect situation and such medical opinions ought to be scrutinized to consider whether one can, in this particular situation, legitimately reach that conclusion without having identified an alternative hypothesis about what did cause the disease. If not, then question the doctors about what the alternative hypothesis is so that that can be weighed in the balance against the possibility of employment causation. A problem with the guidelines is that they focus attention on only one hypothesis, and thereby divert attention from the need to weigh it in the balance with the most credible alternative.

There are other ways, too, in which the guidelines tend to promote an attitude towards occupational disease which is too confined. They tend to imply, for example, that a disease ought to be diagnosed as a single disease entity resulting from an exposure to a particular contaminant. This approach is unlawful as well as being out of touch with industrial reality. In many types of employment, a worker is not exposed to one toxic chemical and nothing else throughout a working career. Often, a worker is concurrently exposed to what you might call a "toxic cocktail" — a mixture of several things. A worker who is not exposed to a mixture concurrently may still be exposed to a mixture of contaminants successively over time. But the guidelines encourage a focus on one contaminant and one industry, rather than a broader view of the possible consequences of exposure to a mixture of chemicals over a working life.

Finally, the guidelines also tend to create a narrow image of the type of claims that the Board expects, and this is likely to be an influence on the type of claims that it actually receives.

Recently, the establishing of recognition criteria has been made a function of the Industrial Disease Standards Panel. I am not optimistic that this will make a significant difference. The main problems with the guidelines do not relate to who produces them. They relate to the basic principle of having this type of guideline at all. They are objectionable in principle, and having them produced in a new structure with aspirations of higher quality is not going to solve the problems. Moreover, I am apprehensive that the creation of yet another institution could involve further delay in the adjudication of claims, and delay is already a problem with the dimensions of a crisis.

FINAL THOUGHTS

Delay

A couple of years ago, I was doing research on the therapeutic significance of compensation structures. When I was interviewing people in the treatment professions about the significance of compensation systems, the complaint that they commonly made, spontaneously, without any questions from me, was delay. That was referred to most consistently as the most negative influence of compensation systems on the recovery of patients from disablement. In some serious occupational disease cases, delay is not going to impede recovery since the disease will be terminal in any event; but even where workers are not going to recover from the disease, there is still aggravation of the disease through financial anxiety about the family, either during the life of the worker or following the death. So even in these cases, delay is crucial, and I am apprehensive about adding another institutional structure such as the Industrial Disease Standards Panel, which may enhance that problem.

Delay is probably also the most serious problem in the Appeals Tribunal. To some extent, this may be transitory. The Tribunal began with a backlog and, of course, any new institution will have its teething troubles. But I do want to stress the importance of delay. It is a crucial thing, and what is happening at the moment is a clear violation of Magna Carta as well as a cause of therapeutic damage to claimants. Bearing in mind that the system was designed in the first place to provide for income continuity, I believe that the Appeals Tribunal should have as its aspiration that anyone can have a hearing within a day or two of the notice of appeal being received. That is difficult at present. It is not going to happen unless primary adjudication is improved and other structural changes are made to avoid the ponderous processes of the adversary system.

Multiple Etiology

The problems of multiple etiology of disease may be under better control now than they have been over the years. The classic examples are the lung diseases which involve industrial exposure in combination with smoking. They tell me at the Board that the current position is simply to allow the claim in full in that situation. There may be some legal quibbles about that, but it is probably the only realistic response. The same position has been taken at some of the other Boards. Alberta, incidentally, allows the claim in full but then discounts part of the cost for cost distribution purposes by attributing part of the cost to the Second Injury and Enhancement Fund.

It gets trickier when the non-occupational cause of

the disease was already having some disabling effect prior to the occupational causes. It is important to bear in mind in such cases that if the causative factors were not operating concurrently, but were operating successively, and if the non-employment cause had already produced some disablement prior to the occupational cause, then that element of disability will already have been discounted in the earnings that the worker was receiving prior to the occupational disability. In effect, it has already been taken into account in establishing the wage rate on the claim. In that situation, it would be wrong to take it into account again by making any further reduction for the non-occupational cause.

One problem of multiple etiology that has caused difficulties is the process of medico/legal interaction. When doctors are asked a question, it is sometimes too general. They are not asked questions with sufficient precision to enable the adjudicator to take the medical report and then apply legal criteria to produce the result.

One example that I like to use is the case of a Department of Highways worker with a primary tuberculous focus on the lung, which I gather most of us have. He becomes stranded in a winter storm and develops active tuberculosis. The adjudicator might ask the doctor, "What was the cause of the disability?" As soon as the question is put in that way, it invites the doctor to select among the range of causative factors and to identify one of them as being the legally relevant cause. That is not what we need doctors to do. What doctors are needed for is an opinion on etiology which identifies the causative factors and how they were physically significant. It then becomes a question of law and policy what you are going to do with that report, and what you are going to regard as the significant causes for compensation purposes.

What I have tried to point out is that a conclusion on cause often involves a legal component which is separate from what you might call the scientific question of cause and effect.

Individual Susceptibility

We still run into problems about individual susceptibility. This is something, incidentally, that some doctors sometimes get wrong as far as the legal position is concerned. They sometimes assume that if there was an individual susceptibility, the disability is not compensable. I do not believe that the majority of doctors think that way, but time and again one finds the theory developed that since other workers with similar exposures did not contract the disease, therefore it did not result from employment. With certain kinds of disease and in certain situations it may make sense, but as a general proposition, it is a non-sequitur.

Wage Rates

One thing which has caused problems is the influence of a disease itself on the wage rate. In mining in particular, somebody would have an occupational exposure, would leave the industry, possibly because of advice following x-ray results, or possibly because of early symptoms of disease, and take a lower paying job. By the time that the claim is made, the worker has an earnings record at a lower level. In some of these cases there may be justification for taking the lower level of wage rate. In other cases, where the worker has left the mining industry because of the disability or the incipient disability, and has moved to a lower paying job, the wage rate should be the wage rate in the mining industry. I am told that this is the Board practice at the moment, and obviously it ought to be.

Supplements

Another area of difficulty, particularly in disease cases, but also in trauma cases, is the application of the wage loss supplements. It is clear that the Board misread the Act on this. In Ontario, during the seventies and even earlier, there were of complaints about the physical impairment method of assessing disability, and demands that there should be a reference to actual earnings loss. The legislative response was to provide for the wage loss supplements. These were provided for in cases of temporary disability and in cases of permanent disability. What happened was that the Board read the legislation, one can say misread the legislation, to reach the conclusion that the wage loss supplements in cases of permanent disability should only be temporary. The legislation did not say that, and since the supplement provisions were included in a section dealing specifically with permanent disability, one would think that it ought to have been read to mean that a wage loss supplement could be permanent.

We might never have had the ongoing dispute about the assessment of pensions if the Board had read the Act properly when the wage loss supplements were first introduced.

WCAT Jurisdiction

When I first read the wording of the Act with regard to the jurisdiction of this Tribunal, it reminded me of a case that I was dealing with in British Columbia. The issue, as it had always been perceived, was whether the worker had silicosis. The worker thought that he had. There was a specialist report to the effect that it was silicosis, and there was an opinion of a Board doctor to the effect that it was not. There was also another medical opinion to the effect that it was not. The case had gone to a Medical Review Panel, but the only question put to the Medical Review Panel was, "Does the worker have silicosis?" The answer was

"No".

I arrived at the Board at the point in time when the Certificate of the Medical Review Panel came back, and I need hardly say that I was horrified. It did not tell us what we really wanted to know. If the worker does not have silicosis, does he have no disability at all, does he have some other disability and if so, what other disability? What was the cause of the other disability?

The Act almost invites the Appeals Tribunal to create the same problem in defining its own jurisdiction, but it also leaves the Tribunal with a range of choice. In the example that I mentioned, one could say "This is entirely a new issue — whether he has got some other sort of disease — therefore it should be referred back to the Board". Or one can say: "The general issue is, does he have a compensable disease of the lungs?" It is probably better for the Tribunal to take the latter course. It horrifies me to see a process of inter-jurisdictional ping-pong between the Tribunal and the Board, with cases being referred back and forth in a snakes and ladders fashion. Someone who struggles to reach the Appeals Tribunal should, as far as possible, receive a decision that is dispositive.

I found an interesting example of this inter-jurisdictional question last year. I was looking at the same question in relation to the Administrative Appeals Tribunal in Australia, and the federal workers' compensation cases that it handles. The Tribunal members were taking a broad view on this question. They were taking a view that was broad enough to say that what the appeal really relates to is what this person is entitled to. That is the issue on the appeal, and therefore the general question that we should put to ourselves is, "What conclusion should the primary adjudicator have reached in response to this situation?"

Suppose that an applicant was asking for a particular benefit, that the whole case had gone through the appeal system on whether he is entitled to that benefit, and that this was the only question to have been decided in primary adjudication. Nevertheless, at the final level of appeal, they might decide that the claimant is not entitled to that benefit, but should have been granted some other benefit. The Tribunal might then order that other benefit to be granted. This approach makes sense. The department of primary adjudication could adduce evidence on the appeal, knowing that this was being considered. Also, the final level of appeal would have gone into the case with more thoroughness than in primary adjudication and it would have had available to it all the evidence that had been adduced previously that anybody had thought relevant at that stage. So there is no great practical difficulty with this approach. If one can overcome the traditional tendency to take a literal and restrictive approach, it makes sense to take a broad view of the jurisdiction of the Appeals Tribunal, so that as far as possible, the outstanding issues in the case can be brought to a resolution without further proceedings.

**Terence G. Ison is Professor of Law at Osgood Hall Law School, York University. Professor Ison was Chairman of the British Colombia Workers' Compensation Board from 1973 to 1976.*

The New Quebec Act respecting industrial accidents and occupational disease

by Claire Desaulniers*

The *Act respecting industrial accidents and occupational disease* came into effect on August 19, 1985 and applies only to accidents, aggravations, relapses, recurrences, and industrial diseases occurring on or after that date. In all other cases the old *Act* continues to apply and workers retain all their vested rights under it.

The object of the new *Act* is to institute a new compensation scheme for employment injuries to replace those under the *Workers' Compensation Act* (L.R.Q., c. A-3) and the *Act respecting indemnities for victims of asbestosis and silicosis in mines and quarries* (L.R.Q., c. I-7). It assigns the administration of the new scheme to the Commission de la santé et de la sécurité du travail (thereafter called CSST). The CSST is also responsible for the administration of several other acts, including an *Act respecting occupational health and safety* (L.R.Q., c.S-2.1), the *Crime Victims Compensation Act* (L.R.Q., c.I-6), an *Act to promote good citizenship* (L.R.Q. c. C-20), and the *Government Employees Compensation Act* (R.S.C. 1970, c. G-8).

As noted above, unlike the situation in Ontario, the CSST also has jurisdiction over the administration of health and safety laws, which principally involves overseeing the development and implementation by employers of accident prevention programs, and the inspection of the work place.

The new *Act respecting industrial accidents and occupational disease* introduces several new features. It puts the accent on protecting the income of accident victims and affirms their right to return to work and their right to rehabilitation. A new medical evaluation procedure is established. The Act also creates a new system of review for decisions rendered by the CSST. A new Review Board with equal employer/employee representation has been set up, as has an external Board of Appeal for cases dealing with work-related injuries.

This paper will focus on the principal changes which have been effected by the new *Act respecting industrial accidents and occupational diseases*.

INCOME PROTECTED

A worker who cannot carry on his employment because of an industrial accident or an occupational disease is entitled to income replacement benefits for as long as he remains disabled and for as long as his physician deems that an improvement in his condition is foreseeable.

For the day of the accident, the employer must pay the worker the salary to which he would normally have been entitled. If the absence lasts beyond the day of the accident, the worker will receive the equivalent of 90% of his net salary for the first 14 days. The employer is required to pay the worker these benefits, which are later reimbursed to him by CSST. Thus, the worker does not have to wait for benefits delayed for administrative reasons. If the worker is absent for more than two weeks, the CSST pays the worker 90% of his weighted net income. That income must be not less than minimum wage nor more than the maximum yearly Insurable Earnings, which in 1988, is $36,500. If the worker remains unable to carry on his former employment, but becomes able to carry on some suitable other employment, his income replacement indemnity will be reduced by the net income that he could earn from that employment. Two years after the date he becomes able to carry on suitable employment full time, the CSST will review his indemnity to see if the income he then is earning from the employment is higher than the amount so far deducted from his indemnity. If so, the necessary adjustment will be made.

Three years after this review, and every five years after that, the CSST will review the indemnity in the same way. The income replacement indemnity will cease on the first of the following events: when the worker becomes able to carry on his former employment again, when he dies, or when he reaches his sixty-eight birthday. In the last case, during the final three payment years, the income replacement indemnity will be reduced by 25, 50 and 75%.

PERMANENT DISABILITY COMPENSATED

If a worker suffers permanent physical or mental impairment, he is entitled to compensation for bodily injury. The maximum indemnity will be $56,514 in 1988 at 18 years of age or under, and the minimum $565.00. It will be adjusted according to the age of the worker and the degree of his impairment. The indemnities are lump-sum amounts. It should be noted that a Table of Bodily Injuries, similar to the rating schedule used by the Ontario Workers' Compensation Board, was not enacted at the time the new Act came into effect. A revised Table was enacted as a government regulation in September 1987. The Act also provides for indemnities to dependents of workers who die as the result of employment injuries. All these benefits are indexed yearly.

ACCENT ON RETURNING TO WORK

The right to rehabilitation and the right to return to work are connected. Rehabilitation enables a worker who has suffered *permanent* physical or mental impairment to exercise his right to return to work.

The worker is entitled to resume his former employment or an equivalent employment with the accident employer as soon as he is able. If the worker is unable to carry out the duties of his old job, his employer must offer him the first suitable employment that becomes available in one of his establishments. This right is to be exercised within a certain time period: within two years if the worker's firm employed more than 20 employees at the time of the accident, and within one year in all other cases. In the case of suitable employment, this right is to be exercised subject to the rules respecting seniority prescribed by the collective agreement.

A CSST rehabilitation counsellor, together with the worker, draws up a personal rehabilitation plan adapted to the worker's needs. The worker must take an active part in the activities included in the plan. A rehabilitation plan may involve physical rehabilitation measures such as physiotherapy, social rehabilitation (such as the adaptation of the workstation) and professional rehabilitation.

The employer of a worker who has suffered an employment injury may *temporarily assign* work to him until he is again able to carry on his former employment or until he is able to carry on a suitable employment, even if his injury has not stabilized, if the worker's physician believes that: (1) the worker is reasonably fit to perform the work; (2) despite the worker's injury, the work does not endanger his health, safety, or physical well-being; and (3) the work is beneficial to the worker's rehabilitation.

If the worker disagrees with the physician's judgment he may ask for review under special provisions in the Act respecting occupational health and safety, and in that case he will not be required to do the work assigned him by his employer until the report of his physician has been confirmed by a final decision of the Appeal Board.

MEDICAL EVALUATION PROCEDURE

The Act grants the injured worker the right to whatever medical assistance his physical condition requires. The worker has the right, subject to certain restrictions, to receive care from the health facility and physician of his choice. The CSST is bound by the opinion of the worker's physician. The Act, therefore, requires the physician to produce a certificate or a report within a certain time period, setting out in full the medical diagnosis, the nature and extent of the treatment prescribed, and the date at which the injury is expected to heal.

If the worker has suffered permanent physical or mental impairment, the worker's physician will send the CSST a final report which must include the percentage of the worker's permanent physical or mental impairment according to the Table of Bodily Injuries set out by regulation, a description of the worker's functional disability resulting from his injury, and a description of the way in which the injury has aggravated any pre-existing injuries or conditions suffered by the worker.

An employer may challenge the certificate or report of the worker's physician if he obtains a report from a physician who, after examining the worker, calls into question the findings of the worker's physician. The employer must submit a copy of the report to the Commission within thirty days of the date of the certificate or report he wishes to challenge.

If the employer does not choose to challenge the certificate or report, the CSST itself may challenge the report in the same manner. The CSST then submits the matter to arbitration by a referee designated by the Minister from a list drawn up each year by the Conseil Consultatif du travail et de la main d'oeuvre on the recommendations of the professional bodies concerned.

The CSST must without delay submit to the referee the complete medical records it holds on the worker regarding the employment injury which is subject of the arbitration. The referee studies the record submitted, and may require any medical information or document from the CSST that it holds or may obtain regarding the worker. He may also examine the worker if he deems it expedient or if the worker so requests.

The referee must, in a substantiated opinion, quash or confirm the diagnosis and the other findings of the worker's physician. This opinion is to be given within 30 days, unless the parties agree to extend the time. For the purposes of rendering a decision, the CSST is bound by the referee's findings and must amend its decision accordingly.

That decision may be challenged directly before the Appeal Tribunal. Review Boards have no jurisdiction in strictly medical matters.

REVIEW BOARDS

A person who believes he has been wronged by a decision of the CSST may apply for review of it by a Review Board within thirty days of notification of the decision. This time limit may be extended for reasonable cause and with appropriate conditions.

The Review Boards are composed of three members appointed by the CSST including a chairman chosen from among its officials, a worker representative and an employer representative. The worker representatives are chosen from a list prepared annually for each region in which the CSST has an

office by those members of the Board of Directors of the CSST representing the various union associations in Quebec. Similarly, the employer representatives are chosen by members of the Board of Directors representing provincial employer associations in such areas as mining, manufacturing, and forestry.

The Review Board determines questions of financing (fixing of assessment, classification, etc.), occupational health and safety matters, and matters relating to industrial accidents and diseases. It also deals with reprisals against workers and the re-assignment of pregnant workers. A hearing will be held, unless the parties renounce the right to a hearing, and a date must be fixed not later than thirty days after the date of application for review. Review Boards are not required to follow the ordinary rules of evidence in civil matters. The Review Board is required to render a decision within 20 days following the hearing of the case.

In 1986 these Boards received 3,782 appeals and handed down 1,947 decisions. These decisions may be broken down in the following manner:

Workers' Compensation	63.5%
Assessment	13.5%
Occupational health and safety	10%
Reprisals and re-assignment of pregnant worker	13%

Former Review Boards (those that were established under the old Act) have continued to decide requests for review of cases arising before August 19, 1985. In 1986 there were about 5,967 challenges to 7,310 files being held in January. 9,629 cases have been decided.

Finally it should be mentioned that CSST counsel occasionally intervene in hearings of Review Boards where important legal questions are at issue or when a question is raised regarding the interpretation of a law within the jurisdiction of CSST. The law does not explicitly provide for representations by CSST legal counsel at a hearing by the Review Board, as it does for representations before the Appeals Board. On a number of occasions one or other of the parties has been opposed to such an intervention.

Notwithstanding several dissenting opinions, Review Boards have consistently ruled that the CSST is permitted to intervene at hearings. An application for judicial review was brought before the Superior Court of Quebec in *Dominion Bridge Sulzer, Inc.. c. C.S.S.T. et. al.*, Cour supérieure de Québec, district de Trois Rivières, 400-03-00 199-860, 15-12-86. The court found that the Review Board's decision was disputable but not unreasonable, and that the employer challenging it should first raise the issue before the Appeals Tribunal, which has full jurisdiction to decide the matter. This decision of the Superior Court is presently under appeal to the Quebec Court of Appeal.

APPEAL BOARD

La Commission d'appel en matière de lésions professionnelles, or the Appeal Board is, like the Review Boards, established by the Act. The Board is composed of at least twelve commissioners, including a president and not more than two vice presidents, appointed by the Government for a maximum term of five years. The president may also appoint full time assessors to sit with and advise the commissioners, who are the decision-makers.

The Appeal Board is the final level of appeal. It hears and disposes exclusively of appeals brought under the *Act respecting industrial accidents and occupational disease* (work accident matters, reprisals, financing) and appeals brought under certain sections of the *Act respecting occupational health and safety* (re-assignment of pregnant workers, decisions rendered by workplace inspectors, right of refusal to perform particular work). Unlike the Review Boards, the Appeal Board also hears appeals from the decisions of medical arbitrators. The Appeal Board may confirm the decision or order brought before it, or it can quash the decision or the order, and in that case, render the decision that should have been given initially. Thus, there is a downside risk for the appellant.

A commissioner has all the powers necessary for the exercise of this jurisdiction. He may rule on any question of the law or of fact. A commissioner has the authority to hear and decide a case sitting alone but, where the president deems it advisable, he may assign one or several assessors to sit with the commissioner. Where an appeal deals with issues of particular complexity or importance, the president has the discretion to designate three commissioners to hear the appeal, one of whom chairs the hearing. In fact, most of the time, a commissioner sits alone. The Appeal Board may, for cause, review or revoke a decision or order previously rendered by it.

Of particular interest is the fact that the Act establishes that the CSST may intervene before the Appeal Board at any time until the end of the hearing. The CSST is deemed to be a party of the appeal if it does so. On several occasions, legal counsel for the CSST have intervened in order to represent the Board's interests at a hearing. This is particularly important in cases dealing with funding where only the employer is present. In the future, the CSST intends to appear by counsel even more often.

The Appeal Board decided, in *C.S.S.T. c. Mecano Soudure Ltée.*, [*1985*] *C.A.L.P.* 12 and *C.S.S.T. c. Les Industries Saguenay Ltée.*, [1987] C.P. 183, that the CSST may itself bring an appeal before it in the same manner as any other person whose interests have been affected by a decision. The CSST will, however, be obliged to demonstrate the nature of the harm being complained of.

A party to an appeal must, within three months of the declaration of appeal, file: (1) a list of witnesses he intends to call; and (2) a copy of the medical documents and reports he intends to submit that are not already in the record transmitted by the CSST.

If the appellant fails to comply with the requirements set out above within the prescribed time, he is presumed to have abandoned the appeal. If another party fails to comply, he will not be allowed to have witnesses heard or to file documents at the hearing. However, the Tribunal may, on reasonable grounds and in appropriate circumstances, extend a time limit if the other party will not thereby suffer prejudice. This is similar to the "three week rule" in effect as a matter of policy and procedure at the Appeals Tribunal in Ontario except that, in Quebec, the Act explicitly sets out the rule.

If the parties to an appeal consent, the Appeal Board may give an assessor the responsibility of meeting with the parties and attempting to reach an agreement.

The Appeal Board sits in all areas where the CSST has regional offices, in 13 different cities spread out across the province. Between January 1 and December 31, 1987, the Appeal Board received 5,928 requests for review and rendered 1,069 decisions.

Either the CSST or a party to the decision may file a decision in the office of the Registrar of the Superior Court. Upon filing, the decision may be executed. This procedure may be necessary, for example, in cases of wrongful dismissal where the employer has been ordered to reinstate the employee and to pay him the wages retroactively owing for the period of dismissal. Where the employer defaults on the judgment, the worker may obtain an order to execute the decision of the Appeals Tribunal.

**Claire Desaulniers is a lawyer who has been with CSST Legal Services in Montreal for seven years.*

Interpreting Section 45(5) of the Workers' Compensation Act

by Thanasis Samaras*

1. INTRODUCTION

There were 106,864 injured workers suffering permanent disabilities on December 31, 1986, in Ontario, according to the 1986 *Annual Report* of the Workers' Compensation Board. Over 80% of them had a permanent disability, which was assessed by the Board under section 45(1) to be 20% or less. At the same time only 4,407 injured workers were on supplementary benefits under section 45(5), while we know that many thousands more were unemployed or employed with a significant wage-loss.

The majority of these WCB pensioners represent, in many respects, the most under-compensated group of all injured workers. The reason is the low pensions awarded under section 45(1) and the unwillingness of the Board to supplement these pensions under section 45(5).

An immigrant construction worker with a low back disability, as an example of one of the most common types of pensioners, is assessed after an accident and awarded a pension that covers only a small percentage of his pre-accident wages. This worker has very limited education, skills and ability to communicate in English. His body strength, about the only asset he could trade in the labour market, is gone for ever. It is very likely that, at the time of his accident, he lost his job permanently as well.

Section 45(1), and therefore the pension of the worker in the example, does not consider his individual circumstances. This worker is under-compensated unless his pension is supplemented under section 45(5), which does consider the individual circumstances. In fact, this is why section 45(5) was introduced in 1975. Supplementary benefits to a pension are to be paid to compensate for the *actual* impairment of earning capacity of an injured worker when the pension itself is insufficient to do this.

The pension of this construction worker should be supplemented until he is fully rehabilitated and has reached a state comparable to that which he was in before his accident. This construction worker, before his accident, not only was earning good wages, but he also had a job. If he cannot be rehabilitated fully, he should be compensated fully. If his actual impairment of earning capacity, after the Board has offered all possible rehabilitation assistance, remains significantly greater than what is recognized by his pension, his pension should be supplemented permanently. It is presumed that the worker co-operates and makes a reasonable effort to benefit from a rehabilitation programme mutually agreed upon.

The permanently disabled injured worker must be compensated fairly and fully. If the actual impairment of earning capacity is greater than what section 45(1) recognizes, section 45(5) comes to *complete* it. The two sections go together. If section 45(1) compensates for the usual (average) impairment of earning capacity of a worker, section 45(5) compensates for the unusual (more than average) impairment of earning capacity of that worker. The two *together* make up the compensation for the permanently disabled injured worker.

The WCB has not used section 45(5) to its maximum potential in the interests of injured workers and recently has revised its policy to place significantly greater restrictions on its use. Several Workers' Compensation Appeals Tribunal decisions have further limited section 45(5) supplements in situations where a worker is found to be unemployable even though maximal rehabilitation has been achieved. This paper challenges these restrictive interpretations of section 45(5) on the basis of the legislative background and intent.

2. WHY WAS SECTION 45(5) INTRODUCED?

Section 45(5) was introduced in 1975, to replace the then existing provision, section 42(5), which read as follows:

> Where the Board considers it more equitable, the Board may award compensation for permanent disability having regard to the difference between the average weekly earnings of the employee before the accident and the average amount that he is earning or is able to earn in some suitable occupation after the accident, and the compensation may be a weekly or other periodical payment of 75% of such difference, and regard shall be had to the employee's fitness to continue in the employment in which he was injured or to adapt himself to some other suitable occupation.

(a) It was introduced to *improve* the above provision. The Ministry of Labour stated in its May 1, 1975 Cabinet submission, *Workmen's Compensation Benefits and Pensions. Recommendations for 1975 Changes* that:

> A review of benefits payable in other Canadian jurisdictions, as outlined in the Background Papers, indicates that Ontario Compensation levels no longer enjoy the leading position which has been traditional in the past. In some areas, *as they relate to pensions particularly,* Ontario benefit

> levels have fallen behind. It is therefore a matter of urgency to raise Ontario benefit levels. . . (emphases added, pages 1-2)

In his statement introducing these proposed changes to the legislature on June 12, 1975, the Minister of Labour noted that:

> The changes in benefits which I am recommending are substantial. The costs of such changes are also substantial and have a total capitalized value of 108.2 million dollars . . . It is my belief that the proposed increases are necessary and that society should be prepared to pay the increased costs which they involve. I therefore seek your support for the amending Act so that *the higher levels of benefits* will be available to Ontario's workers effective July 1, 1975. (emphasis added, page 7)

(b) It was introduced to prevent the under-compensation of some of the injured workers. The pension awarded under section 45(1) compensates for the usual (average) impairment of earning capacity from the nature and degree of the injury. However, when an injured worker's actual impairment of earning capacity is greater than usual, the worker is under-compensated. In other words, the two sections, 45(1) and 45(5) go together; one completes the other. The Minister made this point in his introductory statement:

> The Board has in recent years been paying additional compensation by way of pension supplements to workers with permanent disability *where the clinical percentage of disability based on medical evaluation did not fully recognize the worker's actual earnings impairment.*
>
> The Act will now be amended to clearly provide *for higher levels of benefits* up to 75% of earnings for those permanently disabled workers whose *real* earning capacity is seriously impaired as a result of their accidents. (emphases added, page 6)

The Cabinet submission defines the nature of the recommended benefit change as follows:

> Section 42(5) to be repealed and replaced with a new provision to permit permanent partial disability pensions to be supplemented up to the equivalent of permanent total disability for *significant impairment of earning capacity beyond the level recognized by the scheduled rating.* (emphases added, page 2, para.5)

The purpose of the change is defined on pages 11 and 12 of the *Background Papers* for the Ministry's *Recommendations for 1975 Changes*:

> It is recommended that Section 42(5) be amended on a basis similar to the amendment to Section 41, to permit the scheduled rating to be supplemented in cases *where the effect of the accident on the worker's earning capacity is severe and the clinical rating produces an award which does not fully recognize the true loss of earning capacity* as related to the pre-accident average earnings. . . (emphases added).

In the *Background Papers*, the Ministry noted that the provisions to be repealed were similar in intent and application to the old Section 41 which provided compensation for temporary partial disability. It was amended July 1, 1974, to provide that full compensation could be paid for temporary partial disability, where suitable or light work was not available or the workman cooperated in rehabilitation measures (page 11). In his introductory statement, the Minister of Labour noted that the new Section 41 "recognizes that different workers with different backgrounds and skills are affected differently by temporary partial disability and compensation benefits are now paid on this basis" (page 5), and continues later about the proposed changes to (then) section 42(5): "They (the changes) are designed to provide *equitable* compensation to all those affected by industrial injury or disease" (emphases added, page 7).

3. WHAT IS THE NATURE AND SCOPE OF THE WCB'S DISCRETION IN SECTION 45(5)?

(a) The word "may" in section 45(5) provides no additional discretionary power to the Board. The Board should award a supplement once the statutory conditions set out in subsections 45(5)(a) and (b) have been met. The phrase "the Board may supplement", in section 45(5), should be read as "the Board shall supplement".

(i) The wording of sections 45(1) and 45(5), after the 1975 changes, makes them *complementary*. Section 45(1) compensates for the usual impairment of earning capacity of an injured worker, estimated from the nature and degree of the injury. However, if the actual impairment of the earning capacity of the same injured worker is significantly greater than usual, this worker is under-compensated. Section 45(5) comes to *complete* the award provided under section 45(1).

The intention of the legislature was "to provide equitable compensation to *all*" injured workers, particularly when "the clinical percentage of disability based on medical evaluation does not fully recognize the worker's actual impairment". Thus, since there is no discretion involved in sub-section (1), and, together, sub-sections (1) and (5) were clearly meant to be complementary, the "may"

should be read as "shall" to provide equitable compensation to all injured workers.

(ii) No additional discretionary guidelines are mentioned in discussions on the 1975 amendments, apart from the requirements set out in subsections 45(5)(a) to co-operate with the Board in a rehabilitation programme and (b) to be available for suitable employment.

In the *Background Papers*, the Ministry stated that "such awards should necessarily be dependant on the worker's cooperation in rehabilitation measures and his acceptance of available employment which in the Board's opinion is suitable for his capabilities." (page 12)

Mr. Kerr, head of Claims, WCB, stated in the legislature on December 14, 1976:

> The man must co-operate in a vocational rehabilitation programme to qualify for those supplements. That does not mean that he has to be in a retraining programme. As long as he is co-operating in a back-to-work programme of some kind, which could even mean looking for work with the assistance of our rehabilitation counselor, he is engaging in a back-to-work programme. (3rd. Sess., 30th Parl., at 5836)

Michael Starr, Chairman of the WCB, in an April 17, 1978 letter to P. Biggin of the Union of Injured Workers states:

> So long as a worker is genuinely trying to become independent through employment, with the Board's assistance, it is unlikely that a supplement would be discontinued either arbitrarily or without good reason. (pages 3 — 4)

(iii) The past practice of the Board and the lack of any policy on the use of the word "may" do not support a discretionary approach, other than that explicitly outlined in section 45(5). The past practice has been that supplementary benefits are paid unless the impairment of earning capacity is not unusual (not more than the value of the pension) provided that the injured worker is co-operating with the Board and is available for suitable employment. The Board has been using the "impairment of earning capacity" threshold and the lack of co-operation and/or availability for suitable employment as grounds in denying supplementary benefits. No other "discretionary" criterion has been used.

The guidelines in the Board policies on supplementary benefits have been based on the conditions explicitly stated in section 45(5). There may be some conflicting guidelines in the policy manuals that show inconsistency. However, there is nothing of substance to suggest use of a discretionary power other than what is already stated in the statute.

(b) According to the statute, the Board "may" also fix the period that a pension will be supplemented. The reason for that wording in the statute is that the legislature expected the restoration of the earning capacity of injured workers with the assistance of the Rehabilitation Division of the Board. As it indicated in the *Background Papers*, the Ministry of Labour viewed supplements as *usually* of a temporary nature because of that expectation, while the Minister of Labour, in December of 1976, confirmed that in the unusual situation of a worker who is unemployable the pension will still be supplemented.

Pension supplements under section 45(5) are directly linked with the worker's and the Board's effort to restore earning capacity. The wording of the section is such that it does not limit supplements according to specific calendar months or years. The wording calls for flexibility based on the situation of each individual. The period may, for example, be fixed by the Board to be for life, in a case of a worker that meets the statutory conditions and yet remains unemployable.

(c) The words "in the opinion of the Board" in section 45(5) provides the power to the Board to direct the medical or vocational rehabilitation programmes that are suitable and proper for each individual injured worker. The goal is to restore the injured worker's earning capacity and the Board has to direct the necessary action. It could be the "Board's opinion" that at any given time there is no programme or suitable employment for the worker. In this situation the worker would still be eligible for the supplement. Only where there is a disagreement between the worker and the WCB, amounting to non-co-operation, can the supplement be terminated. The fact that the WCB is given the power to determine the rehabilitation programme does not make its opinion final. The WCB may make mistakes in assessment of what is suitable for a worker and its opinion is subject to review in the appeals system.

4. WHEN AND FOR HOW LONG SHOULD SUPPLEMENTARY BENEFITS BE AWARDED?

(a) Actual impairment of earning capacity is to be measured using actual earnings.

It is important to note that after the 1975 changes, the new section 45(5) does not contain the part of the old section that stated "or is able to earn in some suitable occupation after the accident". The idea of estimating potential earnings from a "phantom job" was dropped in 1975. In fact, the current section 45(6) states that the Board in calculating the amount of supplement "shall have regard to the difference

between the *net average earnings of the worker before the accident and the net average earnings after the accident*" (emphasis added). The Board, in determining the eligibility of an injured worker to a supplement, must compare pre-accident with post-accident actual earnings.

(b) Supplements do not have to be of short duration.

(i) In fact, supplementary benefits are not meant to be available for three months, one year, three years, or any other limited time period. The supplements are available to correct all those cases in which section 45(1) does not adequately reflect the actual impairment of earning capacity. As long as the actual impairment of earning capacity remains significantly greater than usual, and as long as the worker co-operates with the Board and is available for suitable employment, the worker qualifies for supplementary benefits.

In the early years the Board would *automatically* award "supplementary" benefits in the form of *permanent* adjustments to the permanent pensions. As noted in *Decision No. 915*:

> With this provision for equitable adjustment present in the Act in conjunction with the section 45(1) language, the Board was able to adjust permanent pension awards in individual cases where the rough average justice under section 45(1) created a particular, individual injustice. And it is clear that the Board originally did recognize the equitable adjustment provision as being a means of making permanent adjustments to the permanent pensions in such cases. (page 31)

However,

> By 1965 these individual, equitable adjustments to permanent pension levels otherwise determined under the section 45(1) language were referred to within the Board as 'Special Supplements', and they were no longer automatically a permanent adjustment to the pension level. They were also, no longer a lifelong adjustment. It is evident, however, that such adjustments could still be granted that would last the working life of the worker. (page 32)

As a result of the above noted change in approach by the WCB, together with the Board's power to limit the application of such supplements by reference to what the worker could earn in some suitable occupation — the phantom job — the Ontario compensation levels no longer enjoyed a leading position in Canada. The Ministry of Labour, therefore, moved with some urgency to correct the situation. The benefits were to be improved after the 1975 changes and *at least* meet the level of benefits paid in other provinces.

The benefits, after the 1975 changes, do improve as the Board is told not to limit the application of supplements by reference to what the worker could earn in some suitable occupation — the phantom job — and because the supplements are to be paid until the earning capacity is restored. As the Ministry put it in the *Background Papers*:

> Such supplementary awards should *usually* be of a temporary nature since with rehabilitation, the earning capacity *should* eventually be restored. (emphasis added, page 11)

Two years later, the Pensions Section, responding in correspondence on August 30, 1977 to a question raised by the Injured Workers' Consultants related to the length of time the supplements are payable, takes the position that:

> We do not reduce or cancel a supplementary award simply on the grounds that the injured employee has been receiving a supplement for over a year. Regard has to be had for section 42(5) and, as you are aware, a time element has not been placed on that Section . . . . . .

(ii) The Ministry of Labour, as it is seen, wanted to at least meet the benefits levels paid in other provinces. Under "Other Jurisdictions" on page 12 in the *Background Papers*, the provision contained in the Manitoba *Workmen's Compensation Act* under section 32(1.1) is quoted:

> Special additional compensation — Where the Board is satisfied that an injury in respect of which it has allowed compensation under subsection (1) has occasioned a loss in earning capacity that is proportionately greater than the physical loss on the basis of which the compensation is allowed, it may
>
> (a) during a period when the workman is taking rehabilitation training satisfactory to the board; or
>
> (b) *if the board is satisfied that rehabilitation training is not indicated; or*
>
> (c) *if the Board is satisfied that, after a fair and honest effort by the workman, rehabilitation has not produced an earning capacity that is reasonably equivalent to his earning capacity before the injury reduced by the physical loss on the basis of which the compensation is allowed*:
>
> increase the compensation allowed under subsection (1) of such amount as it considers fair and just but the total compensation shall not exceed seventy-five per cent of the average earnings of the workmen. (1970, c.47. s.1, emphases added)

In addition to the above, the following statement in the legislature by the Minister of

Labour on December 14, 1976 is both clear and useful:

> It is my understanding that indeed that situation is covered; that if the individual is unemployable or cannot find suitable employment at that time, that supplemental pension can be raised to the level of full compensation, and that in that consideration socio-economic factors are considered as well. (3rd. Sess., 30th Parl. at 5836).

And Mr. Kerr, head of Claims, WCB, confirms the above statement by the following phrase:

> That is the culmination of the intention under section —

Board Directive 1 on "Temporary Supplementary Awards" under section 45(5) in the Claims Services Division policy manual stated the following after the 1975 changes:

> In cases of employees who will not likely ever obtain suitable employment, regard will be had for income from other sources such as C.P.P., etc. and where this income plus the clinical award equals or exceeds T.T., no temporary supplement will be paid. If total income is less than T.T., a supplement can be considered up to the equivalent of T.T. for an appropriate period of time up to three years and then review to determine if continuation of the supplement is warranted. (page 80, para. 5)

(iii) In *Decision Nos. 915 and 37*, the Workers' Compensation Appeals Tribunal concludes that a supplement could be limited in time even if the worker co-operates with the WCB and is available for suitable employment. According to the WCAT, this can happen if the worker is found to be unemployable and if maximum rehabilitation has been achieved.

In *Decision No. 915* the WCAT states:

> Take for example, a 25-year-old construction labourer with a grade four education, no ability to speak English and no capacity to learn English or to be otherwise upgraded by training.
>
> The worker suffers an injury to his right shoulder which results in total immobility of the shoulder — what the Board's Rating Schedule refers to as a 'totally frozen shoulder'. . . .As is to be expected, the injury in fact precludes continuation of manual labour.
>
> Under the terms of section 45(5), this worker could expect to receive a full supplement during the period it took for the Vocational Rehabilitation Division to exhaust the possibilities of rehabilitation — to satisfy itself that, in fact, there is nothing to be done with this worker. He is unable to do manual labour and he is incapable of doing anything else. Under the post-1975 legislative arrangements, and given the Board's interpretation of section 45(1), once the Vocational Rehabilitation Division makes that determination, that worker would cease to receive a section 45(5) supplement. (page 33)

The legislature, however, with the 1975 changes, had section 45(5) amended, as is stated in the *Background Papers*, "on a basis similar to the amendment to Section 41, to permit the scheduled rating to be supplemented in cases where the effect of the accident on the worker's earning capacity is severe and the clinical rating produces an award which does not fully recognize the true loss of earning capacity as related to the pre-accident average earnings" (pages 11 — 12). Such supplementary awards were seen to be usually of a temporary nature, because it was presumed that with rehabilitation, the earning capacity would eventually be restored. In cases like that of the 25-year-old construction labourer of *Decision No. 915*, where earning capacity is not restored, supplementary benefits should continue, provided the injured worker is ready to co-operate with the Board and to accept suitable employment.

How does someone define "maximum rehabilitation"? The legislature, in the *Background Papers* for the *Recommendations for the 1975 Changes*, suggests that with rehabilitation the earning capacity *should* eventually be restored. The WCB philosophy of vocational rehabilitation is set out in Document No. 01-01-03 of the Vocational Rehabilitation Division manual:

> The cultivation, conservation and restoration of the knowledge, skills, attitudes and physical well-being of the injured worker. The use of all appropriate sciences and disciplines to aid persons handicapped by industrial disease, disability and/or social maladjustment arising out of the condition. The provision of vocational rehabilitation services to enable the injured worker to become capable of pursuing gainful employment and/or to aid in lessening any handicap resulting from the compensable injury or condition. (pages 1 — 2)

Furthermore, it is stated in Document No. 01-01-02 that:

> At the Workmen's Compensation Board, our rehabilitation philosophy is predicated on the concept that we see the injured worker settled

> in the community and employed at a job which is entirely suitable. Our goal is *the* job for *the* person. It is basic that we consider the whole person, that we examine what the disabled person can do rather than what he/she cannot do. This type of evaluation enables the disabled person to ascend the social scale and prevents automatic assignment to a lower status and economic plane. Our belief is that rehabilitation is not complete without employment in a useful job for which the person is suited (page 2). The 25-year-old construction labourer of *Decision No. 915 may* be unable to do manual labour with earnings comparable to his pre-accident earnings. However, he may be able to do something else that pays much less. The contradiction lies in the fact that if the injured worker does not accept a very low paying job, according to the WCAT he is not entitled to supplementary benefits because it is next to impossible for him to find a job paying comparable to his pre-accident job wages. However, if the same injured worker accepts a low paying job, which is possible, he is entitled to supplementary benefits that are classified as "wage-loss supplementary benefits."

The WCAT states in *Decision No. 915*

> . . .there appears to be no statutory limit under section 45(5) to the time during which a wage-loss supplement of that nature could be paid. (page 37)

In my opinion, when the WCAT in *Decision Nos. 915 and 37* interprets section 45(5) as only a temporary measure for injured workers unlikely to return to employment, it departs not only from the philosophy of the 1975 changes, but also from the philosophy of the Board's Vocational Rehabilitation Division, the goal of which is to prevent the "automatic assignment (of the injured worker) to a lower status and economic plane". According to the Board, "rehabilitation is not complete without employment in a useful job". When rehabilitation is not complete, as in the case of the 25-year-old construction labourer of *Decision No. 915*, supplementary benefits should continue while the injured worker is available for suitable employment. The system, having failed once by not completing the rehabilitation of this worker, should not fail twice by not completing his pension award. The worker's pension is not complete without supplementary benefits.

Following *Decision No. 915*, the Board has come up with a new policy on supplements. This new policy ignores section 45(5), its history, and the Board's own past practice. To make matters worse, the WCB's new policy also makes "wage-loss supplementary benefits" payable for a very limited time as is noted below.

(c) Older Workers Supplements

The WCAT, in concluding that supplements are temporary and cannot be continued beyond the point in time that "the intractable nature of the unusual impairment becomes clear", has also relied on the introduction of section 45(7).

"Old age" supplements, in our experience, have been awarded to older injured workers, more or less on a regular basis in the late 70's and early 80's, as part of an unwritten policy of the Board. Such supplements were partial and would apply in cases of older injured workers who were difficult to rehabilitate — those unlikely to return to the labour market. In practice, *it allowed the worker the choice to retire earlier*, provided that the Board agreed that it was difficult for the particular worker to return to employment although not necessarily impossible.

Older workers are a special group of people with their own characteristics. The fact that they are near retirement age means their financial obligations are often substantially reduced. As a result, some older workers have chosen to take early retirement. With the financial help of the albeit not generous older workers supplement, they have been able to achieve financial self-sufficiency. In such cases their involvement with the WCB Rehabilitation Division was minimal — usually one interview — and their WCB Rehabilitation file was almost invariably closed under the categories "Request for Services Withdrawn" or "Financially Self-Sufficient".

On the other hand, if an older worker could not retire earlier, because of financial obligations, regular supplementary benefits would have been paid, and regular rehabilitation assistance requested and offered.

What appears to have been a WCB unwritten policy, later became an "odd" section of the Act. It is "odd" because it is supposed to provide *additional* benefits for older injured workers and not to limit the benefits already provided to *all* injured workers by section 45(5). This section was not introduced to clarify the intention behind section 45(5) and certainly not to affect the benefits of other groups of workers that are struggling to survive by trying to return to some form of suitable employment. The introduction of section 45(7), in my view, does not affect regular supplementary benefits paid under section 45(5).

This section has to be applied very carefully and selectively because otherwise it *discriminates* against older workers. It has to remain *as a choice* to individual older workers that want to retire earlier when their

financial circumstances permit.

It seems to me that there is nothing to preclude a worker from receiving full supplementary benefits for an extended period of time and, in fact, the point of the 1975 improvements was to make that possible. They strengthen the chances that the 25-year-old worker of *Decision No. 915* will receive proper rehabilitation assistance, from the Board and will eventually have a successful return to employment. The Board does not necessarily have to pay that worker full supplementary benefits forever. The Board has to assist that worker to return to employment. One should always take a positive approach, that with enough and proper rehabilitation assistance any worker will be able to return to some form of employment. This should be the driving force for producing the effective rehabilitation services that are necessary.

(d) Wage-loss Supplements

Wage-loss supplements are paid under section 45(5) where the worker returns to work but has a wage-loss greater than the monthly dollar value of his pension. There is no statutory time limit for wage-loss supplements.

The Board's practice has been to award wage-loss supplements for many years, provided the worker was satisfying the statutory conditions. Wage-loss supplements have been *the incentive* for injured workers to return to employment that in many cases paid much less than the pre-accident employment.

The new WCB policy limiting the wage-loss supplements to six months makes absolutely no sense. It will discourage any worker from accepting a low-paying job, for they will only receive a supplement for six months and thereafter be locked into that job. This new policy represents also a serious blow to the rehabilitation of injured workers.

The Board has no statutory power to arbitrarily limit wage-loss supplements to six months. In fact, the introduction in 1985 of the words "the Board shall have regard to the effect of inflation on the pre-accident earnings rate" in section 45(6) improves supplementary benefits and shows no intention to limit them.

5. CONCLUSION

Sections 45(5) and 45(1) are complementary and have to be applied *together* for the compensation of permanent disabilities. Section 45(5) compensates for the actual impairment of earning capacity whenever that is not compensated adequately by section 45(1).

The Board, as the institution that administers the Act, is given the discretion to implement the medical or vocational rehabilitation programmes that are most appropriate for each individual case, with the only goal being to restore the worker's earning capacity. However, this discretion does not mean that any opinion of the Board is correct. In other words, *its opinion is subject to review*. The Board should not use its discretion to limit either benefits or rehabilitation services. The Board should be guided by the section's intention to avoid undercompensating workers with impairment of earning capacity greater than that estimated by the pension.

The conditions explicitly stated in section 45(5), together with the discretionary power of the Board to guide or implement the medical or vocational rehabilitation programmes, are directly linked to the level of the impairment of earning capacity of an injured worker. As long as the impairment of earning capacity remains significantly greater than usual, the Board should pay supplementary benefits and set up the mechanisms to restore the worker's earning capacity.

Workers who are found "unemployable" could also qualify for long term supplementary benefits provided that they are willing to return to suitable employment, even if *the system* cannot offer them much hope. The goal remains the restoration of the worker's earning capacity, and that should be defined as the achievement of maximal rehabilitation. Supplements are to be paid as long as the impairment of earning capacity of the worker has not been restored, and this has nothing to do with a pre-determined number of days, months or even years.

**Thanasis Samaras is a community legal worker with the Injured Workers' Consultants.*

What's So Appealing About External Appeals?

Philip Girard*

This paper was originally presented to the 1985 Conference of The Association of Workers' Compensation Boards of Canada/Association des Commissions des Accidents du Travail du Canada, 19 August 1985, Halifax, N.S. It was revised for publication in December 1987.

In the midst of all the ferment within and around the workers' compensation system over the past fifteen years, the idea of an external appeal body has emerged as a prominent theme in the discussion, particularly in the last half-dozen years. At present, the country stands divided, with six provinces using some type of formal external review, and four not employing such a system. It will be useful to review the current situation briefly before proceeding.

REVIEW OF PROVINCES

Paul Weiler recommended the creation of an external appeal board in Ontario in his 1980 report, and this recommendation was translated into legislation which took effect on October 1st, 1985. Newfoundland established an external Workers Compensation Appeal Tribunal in 1986, seemingly based on the Ontario model.

Quebec has had an external appeal process since 1977, with the Commission des Affaires Sociales hearing workers' compensation appeals as well as appeals under a variety of social welfare statutes. A new act regarding workers' compensation and occupational disease was passed in 1985, however, which replaced the Commission des Affaires Sociales with a specialized external appeal body called the Commission d'appel en matières de lésions professionnelles, a body which will sit in panels in each region of Quebec. The new law also creates a second intermediate tier of review in the form of bureaux de revision (Review Boards), tripartite bodies composed of one labour representative, one employer representative and one member of the Commission de la santé et de la sécurité du travail. Most decisions will be reviewed first by one of the Review Boards before going to the Commission d'appel.

British Columbia has had tripartite review boards for some time, but this spring it entrenched the external review system by creating a Workers' Compensation Review Board which will be a more or less permanent body with labour and employer representation, with the composition of individual panels left to be set out in Cabinet regulations. Alberta has had its system of review by the Ombudsman coupled with Cabinet supervision since 1973, but it was Nova Scotia which pioneered the modern version of the external appeal system in 1975, with the creation of its Workers' Compensation Appeal Board.

While all of the remaining four provinces are currently without an external appeal system as such, two of them — Saskatchewan and Manitoba — make provision for medical review panels of some sort, which can fulfill to some extent the same functions as an external appeal. Thus, only New Brunswick and Prince Edward Island are currently without either form of external appeal. It is worth noting that the Boudreau Committee in New Brunswick studied the question thoroughly in 1979 and decided not to recommend an external review body and indeed advocated the abolition of the medical review panels then existing. Newfoundland, on the other hand, retained its medical committees even after the move to an external appeal tribunal. The Saskatchewan Workers' Compensation Act Review Committee in 1982 and the Alberta Select Committee on Workers' Compensation in 1980 also rejected the idea of external appeals although, as I have noted, Alberta does have a form of external review through the Ombudsman.

COMPLAINTS AND REFORMS

Given this division of opinion, it is worthwhile to reflect briefly on the problems the external appeal is designed to address, and then to inquire whether it is the best method of remedying those problems, or whether other solutions might have a better prospect of success. Let me say at the outset that I have no doubt that a carefully constructed external appeal system can be a great asset to the adjudicative process, and can foster public acceptance of board decisions. However, its effectiveness depends entirely on the reasons for which it was implemented. If it is established simply to deflect attention from more pressing problems within the compensation system, then it will probably fail.

Lack of Accountability

If we take a bird's eye view of dissatisfaction with the workers' compensation system over the past 15 years or so, it would be fair to say that a concern over lack of accountability has generated much of the discontent among employers and workers alike. The Boards were seen as remote, intimidating, and often indifferent to the needs of their clientele. Decisions were not often justified and there was little formal opportunity for input or constructive criticism of board practices by employers or workers. As Dr. Walter J. P. Lampe

summed it up in his 1980 report, *Workers' Compensation in Manitoba: Opportunities for Consolidation and Enrichment*, to the Workers' Compensation Procedural Review Committee:

> Public opinion of workers' compensation is that it is a monolithic system, singularly dominated by the actions and decisions of the administering agency. Agency undertakings are thought of as being self-serving, before-the-fact, and so interpreted afterwards (page 146).

Given the state of the law until recently, it is not surprising that such opinions were widespread. Workers' counsellors were the exception rather than the rule, employer advisers unknown, publication of decisions was not required, and confidentiality provisions in the relevant legislation were interpreted as precluding access by workers to the contents of their files. Medical review panels, where they existed, simply substituted one form of inscrutability for another. In view of this state of affairs, many observers called for the creation of some type of external body as a corrective to the allegedly overly introspective decision-making of the boards.

Procedural Reform

In response to these criticisms, many of these procedures have changed in recent years, with the most noticeable change in the area of access to information. Disclosure to the worker of information collected by the board is now the rule rather than the exception. Workers' advisers have proliferated, and have been made responsible to the Minister of Labour in most jurisdictions, rather than to the board, in order to emphasize their independence. Employer advisers have appeared. Publication of decisions has been mandated in some jurisdictions. A potentially valuable innovation is the provision for periodic review of the legislation by independent bodies appointed by Cabinet, with worker and employer representation. Provision for such a mechanism is made by Saskatchewan in *The Workers' Compensation Act*, S.S. 1979, c. W-17.1, s.162. Every task force and committee which has studied workers' compensation has recommended that the boards do more public relations work, that greater efforts be made to explain board procedures and policies, and that the boards generally adopt a more service-oriented approach to their task. Presumably some changes have occurred in this area, although they are of course difficult to quantify.

But all of these changes, although salutary in themselves, do not seem to have been enough. External appeals are still advocated as the final element in this panoply of procedural reforms. At this point, I think it is worthwhile to pause and ask why this should be so. Why, in spite of all the procedural reforms just discussed, is the external appeal still touted as the magic solution to the ills which beset the workers' compensation system? Two answers suggest themselves. The first is that perhaps the reforms were only cosmetic. It may be that the boards' clients still feel as alienated and frustrated as they ever did, either because the reforms were not properly implemented or because they were too superficial to have any effect. On the other hand, perhaps the clamour for procedural reform was motivated in large part by a concern over substance. If that is the case, if the complaints about workers' compensation are really based on a perception that the benefit system itself is unjust, then no amount of procedural reform is going to change that. Even if procedures were transformed to make the system as open and client-oriented as is humanly possible given current resources, there is no guarantee that the system would be seen as satisfactory unless the *outcomes* of decision-making were perceived as just.

Complaints about Substance

At this point, administrators will usually say that they do not determine the results, the legislator does. This is true to a large extent but, of course, the reality is that administrators are held responsible in people's minds for outcomes as well as for the process by which those outcomes are reached. If injured workers are unhappy because the system provides much less than actual wage loss in many cases, especially with regard to permanent partial disability claims, then no amount of external appeals will convince them that the system is fair. And, of course, it is those working in the workers' compensation system who will continue to be blamed, however unjust this may be.

Substantial Reforms

The moral of the story so far, then, is as follows: do not expect procedural solutions to remedy complaints about substance. Ontario may have been guilty of just this error in its recent legislation, *Workers' Compensation Amendment Act 1984 (No.2)*, S.O. 1984, c.58, in which it implemented most of Paul Weiler's recommendations with regard to an external appeal tribunal but conveniently ignored his proposals to move to a dual award system in cases of permanent partial disability, of which actual wage loss would be one component. The latter proposals are apparently still under consideration, but it would be interesting to know whether their implementation would have rendered the creation of the Workers' Compensation Appeal Tribunal unnecessary. This observation in no way implies that the functioning of the current Tribunal has been unsatisfactory — I have not examined its jurisprudence in detail and am thus not in a position to

comment — but merely queries whether a different policy choice in 1985 might have been more effective.

It is useful to contrast the reforms in Saskatchewan with those in Ontario, in order to emphasize this point. Saskatchewan was the first province to move to a wage loss system based on the difference between pre- and post-injury earnings. It has no provision for external appeals, although there are medical review panels in which the worker selects two of the three doctors who will render a decision. Yet, at least as of 1982, there was a sufficient degree of support for the new system that the Workers' Compensation Act Review Committee, composed of employer and worker representatives, was able to say in the introduction to its 1982 *Report* that it had achieved "consensus on nearly every issue". The Committee recognized that there was still a "perception in many workers' minds that appeals they make are doomed from the start" (page 54). But in order to remedy this it recommended a clearer division of authority within the board itself, with the roles of adjudication and administration more sharply delineated. This is certainly a legitimate alternative to an external board and an approach which has been suggested in other jurisdictions, including the *New Brunswick Workers' Compensation Act Study Committee (Boudreau Committee) Report* in 1980.

Quebec, on the other hand, has implemented both a system similar to that of Saskatchewan for calculating wage loss and a new system of external appeals. In order to further emphasize the independence of the new Commission d'appel, it has been placed under the aegis of the Minister of Justice. But if the government is serious in setting up this new body as an external appeal body, one wonders why it was also necessary to set up a second intermediate level of review in the form of the Review Boards which I mentioned earlier. Given that a full hearing is contemplated at the Review Board stage, as well as at the Commission d'appel, delays and costs are bound to mount. The experiment will definitely be watched with interest in the rest of Canada, however.

To summarize, I think it is clear that the demand for and interest in external appeal boards over the last decade is simply one facet of a much broader debate over the nature of the workers' compensation system in Canada. The debate has centred on two main themes: the accountability of the boards for their procedures, and the demerits of the existing benefit scheme. While I have argued that one cannot address complaints about substance with procedural reforms, I think it is useful to address the merits of the procedural reforms on their own for a moment.

Democratization

One of the most striking aspects of these reforms is what I will call the democratization of board policy-making and decision-making. By this I do not mean direct participation in decision-making but rather the enhanced involvement of both workers and employers in the workers' compensation process as a whole. This change has manifested itself in many ways, one of the most notable being the trend to physical decentralization, with board services now commonly offered outside provincial capitals. Greater liberality in the area of access to information and the provision of independent counsellors are another illustration; both allow a much more effective airing of the issues in a given claim than was previously the case, and permit the claimant to feel, one hopes, that he or she is providing input for the eventual decision rather than arguing vainly against a *fait accompli*.

In the area of policy-making, board structure has been altered in order to provide for more control by worker and employer groups in some jurisdictions. In Ontario, for example, section 15 of the *Workers' Compensation Amendment Act 1984, (No.2)*, S.O. 1984, c.58 amended the law to provide that members of the board "shall be representative of employers, workers, professional persons and the public"; in Quebec, section 141 of the *Occupational Health and Safety Act*, S.Q. 1979, c.63, states that seven of the directors of the Commission de la santé et de la sécurité du travail must come from a list provided by union associations, and seven from a list provided by employer associations. While, of course, governments have always been careful to maintain some kind of balance between employer and worker interests in the past with regard to board appointments, I think these recent legislative changes illustrate an attempt to ensure that board policies are arrived at after a full airing of the concerns of those most directly affected, rather than by administrative fiat. Parallel to this change in membership has come an effort to distinguish clearly between the different branches of the board: an executive core, composed of a chair and one or more vice-chairs, a policy-making body (or legislature if you will) in the form of a board of directors, and adjudicative personnel (the judicial branch). The change in nomenclature in Ontario, Quebec and Newfoundland from "commissioners" to "directors" is significant and, in my opinion, will assist in clarifying the different roles played by different members of the board's personnel. It should also help to emphasize that the best place for input by affected groups is at the level of policy-making rather than at the level of individual adjudication.

The last manifestation of this trend to democratization which should be mentioned is the new provision for periodic review of the legislation and Board activities by worker and employer representatives. Along with the changes in access to

information this is potentially the most significant change in the system since it was set up seventy years ago. Previously we were caught between two extremes: either the system was left to function on its own and never investigated at all, or it was subject to irregular *ad hoc* inquiries whenever dissatisfaction had surpassed a certain level.

New Brunswick is an example of the first way of proceeding. The Boudreau Committee noted in its 1980 *Report* that it was the first body ever to investigate the workers' compensation system since it was set up in that province in 1918 (page 72). Since 1980 New Brunswick has more than made up for lost time, but that does not excuse what amounted almost to criminal neglect in prior years.

Ontario has travelled the second route, appointing a royal commission or task force once every decade for the past thirty years. In 1950 it was a royal commission chaired by Mr. Justice Roach; in 1967 one chaired by Mr. Justice McGillivray. In 1980 the Weiler report was commissioned and there is bound to be another before the 1990's are very far advanced. While such inquiries have their place, they are too often conceived in haste and repented (or ignored) at leisure, with a tendency to "cool off rather than light up the impulse for reform", as Weiler noted in his own 1980 report *Reshaping Workers' Compensation for Ontario* (page 11). They are no substitutes for periodic review by those most directly affected by the system. Periodic review was implemented in Saskatchewan in 1979 and recommended in New Brunswick by the Boudreau Committee in 1980, although not as yet implemented there. The New Brunswick *Workers' Compensation Act*, R.S.N.B. 1973, c.W-13, s.84, as am. by S.N.B. 1980, c.56, does allow the Minister to appoint a policy and research committee, composed of two worker and two employer representatives and a neutral chair, which is to meet three times yearly and make proposals to the Minister "in order to promote better service to the clients of the Board". Such an institution is also useful but should be linked with a periodic review of the system every four or five years for maximum effectiveness.

CONCLUSION

Why have I gone to such lengths to describe this trend to democratization? How does all of this relate to external appeals? I think the link is direct and simple. The clamour for external appeals arose because workers did not trust board decision-making. That lack of trust arose because they were virtually excluded from any effective voice in the workers' compensation system. If the changes which I have described above are implemented fully and effectively, changes which are designed to give client groups a stronger participatory role in the system, the desire for external appeals should diminish accordingly. In a sense, external appeals are the easy way out. They can be a sort of consolation prize to gloss over deficiencies which exist at the board level. It is a much more difficult task, but more worthwhile in the long run, to address those deficiencies directly. The changes which have taken place in the last decade are attempts to do just that. It is too early in most cases to assess whether they will have the desired effect, but I think there is some cause for optimism based on the record thus far.

Let me reiterate that I have nothing against external appeal tribunals in principle. My main concern is that they not deflect us from the more important task, which is bringing the workers' compensation boards' structure, processes and policies into line with the new demands of the 1980s and 1990s. A good start has been made on that front, and I hope to see it continue.

**Professor Girard is a professor at the Faculty of Law, Dalhousie University, in Halifax, Nova Scotia.*

Accident Compensation in New Zealand

Bruce Arnott*

> [New Zealand is] a laboratory in which political and social experiments are everyday made for the information and instruction of the older countries of the world.
> H.H.Asquith, (British Prime Minister 1908 — 1916), quoted in Keith Sinclair, *A History of New Zealand* (1984), page 187.

New Zealand is a land of great natural beauty. To the Maori, it is known as Aotearoa — the land of the long white cloud. To the lawyer, it is sometimes called the land of the administrative tribunal. For a country of only 3.3 million people, the proliferation of administrative tribunals in all areas of law is quite remarkable.

The most famous of all New Zealand administrative tribunals is the Accident Compensation Corporation (ACC). Since its inception in 1974, the ACC has administered the most comprehensive scheme for provision of compensation for personal injury by accident in the common law world. The *Accident Compensation Act (ACA)*, constitutes a rejection of the tort notion that compensatory awards to victims should also punish and deter wrongdoers. To be compensated for the costs of an accident in New Zealand, it is not necessary for the victim to prove that the accident was due to the fault of another. All victims of personal injury by accident can receive compensation on a no-fault basis from an administrative agency, even if the accident did not arise out of and in the course of employment.

The Royal Commission that recommended the accident compensation scheme characterized the negligence action as a lottery in which both entitlement to compensation, and the quantum, can depend on any one of a wide range of variables (from contributory negligence to the ability of an advocate) which have nothing to do with the needs of the victim. The Commission, chaired by Mr. Justice Woodhouse, (then of the Supreme Court of New Zealand, later President of the Court of Appeal), indicates the philosophy behind the scheme at paragraph 89 of the section on "Personal Injury in New Zealand" in its December 1967 *Report* (commonly known as the *Woodhouse Report*):

> People have begun to recognize that the accidents regularly befalling large numbers of their fellow citizens are due not so much to human error as to the complicated and uneasy environment which everybody tolerates for its apparent advantages. The risks are the risks of social progress, and if there are instinctive feelings at work today in this general area they are not concerned with the greater or lesser faults of individuals, but with the responsibility of the whole community.

The Commission concluded at paragraph 1 that:

> The toll of personal injury is one of the disastrous incidents of social progress, and the statistically inevitable victims are entitled to receive a co-ordinated response from the nation as a whole.

The *Woodhouse Report* and the resulting legislation have attracted attention throughout the world. Most commentators outside of New Zealand have been concerned with responding to a basic challenge to tort liability. See for example L.N. Klar, "New Zealand's Accident Compensation Scheme: A Tort Lawyer's Perspective" (1983), 33 UTLJ 80. The accident compensation scheme is frequently mentioned in debate concerning the future of workers' compensation and tort law in Ontario. The focus of debate in New Zealand has shifted from general theory to specific concerns about the administration of the *ACA*. The purpose of this note is to provide a brief introduction to the *ACA* and to examine how it is administered on a daily basis. My intention is to indicate that the New Zealand experience is useful not only as a model for reform of the law relating to accidents in Ontario, but also as a guide in the application of our current *Workers' Compensation Act*.

THE ACCIDENT COMPENSATION ACT

The first *ACA* was passed in 1972. It established the Accident Compensation Commission, which in 1980 became the Accident Compensation Corporation. Most tort actions for personal injury or death resulting from accidents were abolished when the remaining provisions of the Act took affect in 1974. The Act was amended, consolidated and generally "streamlined" with the *ACA* of 1982. I will refer to sections of the 1982 *Act*, which is the most current *Act*.

The New Zealand accident compensation scheme is not a comprehensive scheme of social insurance to meet the needs of all who suffer disability. The most significant exclusion from coverage under the scheme is disease. The Woodhouse Commissioners admitted that this exclusion was pragmatic. The Commissioners were concerned about implementing the major changes they had already proposed and about the costs of providing coverage for sickness and disease. In his paper, "New Zealand's No-Fault Compensation Scheme — 12 Years On", presented at the

Commonwealth Law Ministers Conference in Zimbabwe, held from July 27 to August 2, 1986, the Minister of Justice and Deputy Prime Minister of New Zealand, the Rt. Hon. Geoffrey Palmer, stated that the failure to provide compensation for disease cannot be justified in terms of "social equity". His position is that:

> Elimination of distinctions between people based on the cause of their incapacity must occur. I have no doubt that it is the most important piece of unfinished business arising out of reforming accident law in New Zealand.

Coverage is provided under the current scheme as follows. Any person who suffers a personal injury by accident has "cover", which is defined as entitlement to rehabilitation assistance and compensation under the Act (section 2(1), *ACA*). "Personal injury by accident" includes: "the physical and mental consequences" of the injury; a medical misadventure; and actual bodily harm caused by a person engaged in criminal activity, whether or not charges are laid (section 2(1), *ACA*). "Personal injury by accident" does not include damage "caused by cardio-vascular or cerebro-vascular episode" unless the episode is the result of abnormal "effort, strain, or stress, that arises out of and in the course of employment". Furthermore, damage to the mind or body that is "caused exclusively by disease, infection, or the aging process" is not a personal injury by accident (section 2(1), *ACA*).

The ACC has exclusive jurisdiction to determine whether there has been a personal injury by accident (section 27(3) and (4), *ACA*). No person shall institute an action for damages arising out of a personal injury or death by accident in any court in New Zealand independently of the *Act (section 27(1), ACA*).

It is still important to distinguish conditions that arose "out of and in the course of employment" because industrial disease and industrial deafness are deemed to be a personal injury by accident (sections 2(1), 28(1) and 29(3), *ACA*). Furthermore, all employees who lose time from work as a result of a personal injury by accident arising out of and in the course of employment shall receive compensation for lost earnings during the week following their accident (section 57(1), *ACA*). Entitlement to benefits is otherwise the same as if the accident did not arise out of and in the course of employment. All accident victims can recover for lost earnings after the first week (section 59, *ACA*). Compensation can be paid for various forms of non-economic loss including a loss of "capacity for enjoying life" (section 79(1)(a), *ACA*) and "pain and mental suffering" (section 79(1)(b), *ACA*).

The accident compensation scheme is financed by levies on motor vehicles, employers, the self-employed and by contributions from general tax revenues.

THE ADMINISTRATION OF THE ACCIDENT COMPENSATION ACT

The Woodhouse Commission travelled around the world to investigate potential reform of workers' compensation legislation in New Zealand. The Commissioners offered few details as to how the new scheme they recommended should be administered. They stated their general aim at paragraphs 309(6) and 280(f) of the *Report*: "informal and simple" procedures in "non-contentious processes of assessment and review with recourse to the Courts only upon a point of law". The administrative scheme they were most impressed with was that of the then Ontario Workmen's Compensation Board. They characterized the Ontario scheme at paragraph 308(6) as a process of:

> . . .application, inquiry, investigation, and decision at the first level; review by a review committee at the request of the claimant; an appeal to an appeal tribunal which may hold viva voce hearings at which the claimant may be represented if he so desires; and a final appeal to the members of the Board itself.

The Commission recommended at paragraph 308(c) "that a somewhat similar approach be adopted in New Zealand except that on a point of law there should be an appeal to the Supreme Court". No thought appears to have been given to making an administrative tribunal the final level of appeal on all matters.

The scheme established for the administration and review of accident compensation claims resembles the model recommended by the Woodhouse Commission. A claimant initiates each claim by filing a standard form, or forms, with the ACC. The ACC shall then give a decision "as soon as practicable. . . in respect of which an application for review may be made" (section 100(1), *ACA*). On receipt of such application, the Corporation is also instructed to "endeavour to resolve the matter at issue promptly by administrative means" (section 102(2), ACA). Therefore, the matter is reviewed internally. As T.G. Ison points out at page 107 of his 1980 book, *Accident Compensation*, each "decision is reconsidered and possibly revised by an official of the ACC, usually one more senior than the Claims Officer who made the initial decision but in the same office." Ison offers the most thorough criticism of this level of review.

Two review hearings are provided by the *ACA*. The claimant's first right to appear before a decision-maker comes at the Review Officer level, where an applicant is entitled to appear in person or by representative and present "any relevant evidence in support of the application" (section 102(5) *ACA*). The Review Officer

has an investigative as well as an adjudicative role and, therefore, he "may receive such other relevant evidence and make such enquiries as he thinks fit" (section 102(6) *ACA*). The purpose of the Review Officer in the hearing is, according to former member of the Appeal Authority A. P. Blair, at page 157 in the 1983 edition of *Accident Compensation in New Zealand*, ". . .to disclose to the applicant the material on which the Corporation's decision is based, and to enable the applicant to discuss that material, and to furnish any further relevant information and make submissions".

Review Officers are not bound by the policy of the ACC. Though they are appointed by the Corporation (section 102(1), *ACA*), they are to "act independently" (section 102(8), *ACA*). In practice, there is no conflict with ACC policy because employees of the Corporation, usually Counsel to the Corporation, are appointed as Review Officers. They appear to share the goals and philosophy of the Corporation and are analogous to the Hearings Officers at the Ontario Workers' Compensation Board (WCB).

An appeal to the next level of appeal, the Appeal Authority, results in the first review of a claim that is independent of the ACC. The Appeal Authority is directed "to sit as a judicial authority for the determination of any appeal that lies to that Authority" (section 103(2), *ACA*). Members of the authority must be qualified as "a barrister and solicitor of the High Court of not less than 7 years' practice" (section 103(3), *ACA*). The current members are two High Court Judges. Members are appointed by the Governor General on the recommendation of the Minister of Justice for three-year terms (section 103(4), *ACA*). One or more members can sit as the Authority. Usually one member sits on a case. Expert Assessors may be appointed by the Authority, with or without consent of the parties, where the Authority is of the opinion that their specialized knowledge will be of assistance (section 106(1), *ACA*). When such assessors are appointed, they sit and act as extra members of the Authority (section 106(1), *ACA*).

The closest Ontario analogy to the Appeal Authority is the Workers' Compensation Appeals Tribunal (WCAT). The jurisdiction of the two bodies is similar. The procedures for review of decisions at the ACC must be exhausted before an appeal lies to the Appeal Authority (section 107, *ACA*).

An appeal to the Authority is not an appeal as the term is used in the courts, nor is it a *de novo* hearing. It is most commonly described as "a fresh look" at the matter in issue. In *Re Sharland* (1977), 1 NZAR 288 at 290-291, the Appeal Authority explained that:

> . . .although the Appeal Authority does not hear cases *de novo* in the sense that it necessarily re-hears the evidence, it does attempt, as I think earlier decisions will demonstrate, to approach each case with a fresh mind and has been liberal in allowing fresh evidence to be called in appropriate circumstances.

An appeal is to be by way of rehearing (section 109(1), *ACA*). Where a question of fact is raised, evidence received by the ACC or Review Officer is to be brought before the Authority (section 109(1), *ACA*). The Appeal Authority, however, "may rehear the whole or any part of the evidence" (section 109(3), *ACA*), "whether or not the same would be admissible in a Court of law" (section 109(5), *ACA*). The High Court has made it clear in *Cox v. ACC*, [1983] NZACR 534 that the Appeal Authority cannot totally disregard the decision under appeal and hear a matter *de novo*, The Court held that, in an appropriate case, the Appeal Authority can reach its own opinion on the merits, but that this should be done with circumspection. The Appeal Authority is prepared to substitute its own opinion of fact and law because, as it stated in *Re R: Decision 870*, [1982] NZACR 404 at 410, "where the law gives a right of appeal it should be a reality and not an illusion". The fresh look approach seems a reasonable compromise between an appeal and a *de novo* hearing with the advantages that the Authority will not be unduly restricted in reviewing matters that were handled poorly below and that evidence will not be unnecessarily repeated.

The Registrar of the Appeal Authority sends notice of every appeal to the ACC. The Corporation must then provide the equivalent of the WCB file to the Appeal Authority (section 108(4), *ACA*). This includes copies of all documents, reports, notes and other papers received or prepared by the Review Officer or the Corporation. The Corporation may also provide a report setting out the considerations on which the decision is based and any other matter relevant to the decision or to the general administration of the ACA (section 108(5), *ACA*). This may be statutory authority for the equivalent of the WCAT Case Description. Copies of such reports are sent to all parties to an appeal and they may make submissions on any matter referred to in the report (section 108(7), *ACA*).

ACC lawyers play an active role in Appeal Authority hearings. Their purpose is to ensure that any benefits awarded are permitted by the Act, according to Blair on page 2 of *Accident Compensation in New Zealand*. They ensure that all relevant evidence is before the Appeal Authority and that all necessary arguments are made. This is important because there are usually no respondents in accident compensation cases. In representing the ACC, the Corporation lawyers state that they are disinterested as to the facts of any particular appeal but will defend Corporation policy.

Participants in the typical Appeal Authority hearing are concerned solely with legal argument. Case law from the courts and the Authority is usually argued by

Counsel and cited in decisions of the Authority. The Appeal Authority is not bound by precedent, but previous decisions on point can be very persuasive. The significance in accident compensation proceedings of precedents and other aspects of an adversarial hearing is debated. The ACC stresses that its procedures are informal and non-contentious. There is a conscious attempt to avoid a "drift to legalism". However, F. Sutcliffe has argued, in "Precedent and Policy in Accident Compensation" (1976-77), 7 NZULR 305 at 324, that because a claimant must often present expert argument and detailed evidence to establish entitlement, this emphasis of the ACC may mislead claimants and lull them "into presenting a badly prepared case".

The Appeal Authority may "confirm, modify or reverse the decision appealed against" (section 109(7), *ACA*). It may also send a matter back to the ACC, in whole or in part, for further consideration (section 109(8), *ACA*). When the Corporation receives the decision of the Authority it "shall forthwith take all necessary steps to carry that decision into effect" (section 109(9), *ACA*).

The next body that can be appealed to is the Administrative Division of the High Court. Leave to appeal to the High Court may be granted by the Appeal Authority or the High Court "on a question of law" or on a matter of "general or public importance". A further appeal may be made to the Court of Appeal on a question of law with leave of the Administrative Division of the High Court or of the Court of Appeal. Any decision of the Court of Appeal on any appeal or any application for leave to appeal "shall be final" (section 112(13), *ACA*). Despite the unequivocal nature of this statutory pronouncement, there is disagreement on the constitutional question of whether such provisions can prevent appeals to the Privy Council. This provision has not been tested because no one has tried to appeal from a decision of the Court of Appeal in an accident compensation claim.

CONCLUSIONS

The WCAT has noted at page 8 of Interim Decision No. 24 that:

> Where in a case before the Tribunal an issue of difficulty and importance arises which tribunals and courts in other jurisdictions have had occasion to consider, in this panel's view it would be wrong, and against the interests of both workers and employers, for a Hearing Panel to refuse to look at such decisions.

In New Zealand, there is an administrative scheme for providing compensation for personal injury by accident that is remarkably similar to the workers' compensation administration in Ontario. The New Zealand scheme has been in operation for 14 years. Large numbers of claims have been processed — by March 31, 1984, the ACC had handled 1,318,545 claims, according to J. L. Fahy at page 16 of the 1984 edition of *Accident Compensation Coverage: The Administration of the Accident Compensation Act*. Many of the legal, medical and policy issues that the WCB and WCAT face on a daily basis have already been considered in New Zealand. There is much to be learned from accident compensation practice and decisions. This brief note can only hint at the potential.

Perhaps the most useful guidance to be gained from New Zealand results from the nature of their appeal system. Knowledge of the relationship between the Appeal Authority and the Accident Compensation Corporation can help in determining an appropriate relationship between the WCAT and the WCB. Procedures at the ACC can indicate a good balance between the investigative and adjudicative functions of the WCB and the WCAT. Procedures at the Appeal Authority should be remembered in considering which aspects of a *de novo* hearing and an appeal that are best for the WCAT. The role of Counsel to the ACC can be studied in determining a suitable role for the Tribunal Counsel Office of the WCAT. The effect of precedents at the Appeal Authority can be considered by Hearing Panels of the WCAT when assessing the significance of decisions of other Hearing Panels, other Agencies, and the Courts.

My focus on details of the administration of the *ACA* should not obscure the fact that it is bold and innovative social legislation. As Palmer indicates in "New Zealand's No-Fault Compensation Scheme — 12 years on", the accident compensation scheme has served New Zealand well and is regarded by New Zealanders as "sensible, humane and a thoroughly reasonable way of doing things". He adds that:

> The demise of the common law tort liability in New Zealand has been notable only for the complete lack of public lamentation on the matter. I can tell you that the absence of tort liability in New Zealand has neither reduced once-proud legal firms and insurance companies to penury, nor resulted in outraged would-be litigants pleading with Government to turn the clock back. (page 2).

Generally speaking, the New Zealand experiment in accident law has been a success. We could benefit from similar measures in Ontario. In the meantime, however, we can gain valuable guidance from New Zealand experience when we apply our workers' compensation legislation.

POSTSCRIPT

Since I wrote the above, the WCAT library has obtained the New Zealand Administrative Reports (NZAR's), which contain many significant accident compensation decisions, and "a discussion paper" of the New Zealand Law Commission entitled *The Accident Compensation Scheme*, 1987.

The Minister of Justice asked the Law Commission to review the scheme and in particular the administration and funding of it. The review appears primarily to have been caused by concern about escalating costs.

The Law Commission invited public submissions and had this to say at paragraph 12 about the response:

> Although many people put forward suggestions for the scheme's improvement or considered that levies should be handled in some different way, an overwhelming number of the submissions we received (no fewer than 750) expressly supported its underlying concepts. They indicated that its general form should be retained.
>
> That may seem a surprising response from those who at the same time were critical of particular aspects of the system. A recent nationwide pool yielded a similar result. Out of a sample of 2,500, 80% supported the Accident Compensation scheme, though many also responded positively to questions which suggested a redistribution of some of its costs.

Employers are the largest funders of the scheme. Many employers expressed concern about heavy increases in levies on them. However, a "large majority wish to have the accident compensation system continue in operation" (paragraph iii). The widespread support of those who live with and have critically examined the scheme indicates that accident compensation is a workable alternative to tort litigation.

The Law Commission issued its *Report* on the accident compensation scheme in May of 1988 (NZLC R4). At the time of this writing, the *Report* has not been received at the WCAT library. The following comments from a very interesting summary of the *Report* at paragraph 72 — 189 in 2 *Australian Workers Compensation Guide* (CCH Australia Limited) are worth noting:

> The escalating and unexpected cost increases of the scheme have been exaggerated, according to the report. The injury scheme is still inexpensive, at 60 cents per person per day for protection against every kind of accident. Abuse is also not widespread, the report found.

The Law Commission, according to the *Guide*, has recommended that sickness be covered under the accident compensation scheme. Draft legislation to replace the 1982 *ACA* was provided with the *Report*.

**Bruce Arnott is a barrister with the Tribunal Counsel Office of the Workers' Compensation Appeals Tribunal. He received his LL.M. from the University of Auckland, New Zealand, in 1987.*

The Recognition of Spine Disabilities in Ontario Workers' Compensation Law

Richard Fink*

INTRODUCTION

Dr. Doyle, a senior orthopaedic surgeon employed by the Ontario Workers' Compensation Board, made the following statement which was quoted in a decision of the Ontario Workers' Compensation Appeals Tribunal:

> Some degree of intervertebral joint disease is universal by age 30. . .symptoms from it are reasonably common and many studies suggest that they occur at one time or another in more than 50% of people . . .The only reasonable way I know to proceed under such circumstances is to attempt to estimate the contribution to the overall picture of the industrial accident. . .(*Decision No. 34/87*, McIntosh-Janis).

The Appeals Tribunal's problem arises with the following statement: "medical science's understanding generally as to what causes disc disease to become symptomatic and progress is itself very limited". (*Decision No. 32*, Ellis). By considering the physiology of the back to be the "black hole" of medical science, the Appeals Tribunal and the Compensation Board have rationalized their propensity to make many bizarre and contradictory decisions on whether work has contributed to degenerative disc disease. This paper tries to sort out those decisions.

DEGENERATIVE DISC DISEASE

First General Rule

The First General Rule for spine benefit eligibility, accepted by the Compensation Board and the Appeals Tribunal, can be stated as follows: *If degenerative disc disease is asymptomatic before the work event and continues to be symptomatic thereafter, then the disability is compensable.* Conversely, if the worker recovers a short time after the work event but later has a spontaneous reoccurrence, particularly while at home, then the disability is solely from degenerative disc disease and not compensable (*Decision No. 32*, Ellis, page 4).

Second General Rule

The Second General Rule states that *where there is an increase in pain on account of an accident, and such pain continues at its increased level after the accident, then the pain is compensable in its entirety.* The Workers' Compensation Appeals Tribunal *Decision No. 72* (Ellis) is an application of this rule. The worker was a sewing machine operator who bent down to pick up some material. She had been previously symptomatic with back pain, but her pain increased after bending down. The Tribunal stated that no unusual occurrence was needed to constitute an accident, and that the onus is on the employer and the Compensation Board to prove the condition did not arise out of work. This matter is under review before the Corporate Board of the Workers' Compensation Board.

The First and Second General Rules have sponsored the concept of "peek-a-boo" degenerative disc desease: now you see it, now you don't. Remember, Rules 1 and 2 require *continuity* of disability following the accidental event, and for the worker to be asymptomatic before the accident event.

In *Decision No. 430/87* (Newman), continuity of post accident disability was broken because the worker lost no time from work.

In *Decision No. 701* (McIntosh-Janis), asymptomatic continuity was not broken by a home accident because no time was lost from work. This proposition has doubtful validity in view of the fact workers lose far less time from work due to back injuries at home than at work. (See Fink, *Compensation Appeals Forum*, Vol. 2 No. 2).

Continuing with this logic is *Decision No. 467/87* (Marcotte) where it was found that playing baseball is not conclusive evidence that a worker has recovered from his back disability.

At the end of this logical continuum is the "time bomb effect" announced in *Decision No. 111* (Thomas). In that case, a radiator repairman engaged in heavy work was given extensive compensation benefits on account of pain which became apparent at home. This worker never had an accident at work.

The policies adopted by the Workers' Compensation Board and the Appeals Tribunal regarding the necessity of continuity of back complaint in General Rules 1 and 2 encourage invalidism rather than promote recovery, and are similar to the Compensation Board's current treatment of chronic pain.

Third General Rule

The Third General Rule is a logical extension of the First: *If the worker has symptomatic degenerative disc disease before the accident, and the disc disease is asymptomatic for a period of time until a new accident, then the condition is compensable.*

In *Decision No. 200/87* (Bigras) the worker was pain free for 18 months prior to a minor back strain at work.

The worker, according to the Tribunal, had spinal stenosis, which is a narrowing of the spinal canal usually caused by degenerative disc disease, but which can be caused by trauma. The Tribunal ruled the worker had recovered from her first episode of non-work back pain, and was for years afterwards disabled by her second episode of back pain occurring at work.

Decision Nos. 841 & 31 put some limits on the Third General Rule and to some extent are in contradition to this rule. In *Decision No. 841* (Hartman), the WCAT ruled that where there is a lengthy history of back flare ups (a possible distinction from *Decision Nos. 200/87 & 557*), the flare ups at work should be paid for the period of flare up only and not subsequent periods of disability. In *Decision No. 31* (Signoroni), continuing back problems are related to the on-going *progression* of degenerative disc disease and not the accident.

In this author's experience, the Compensation Board applies the Third General Rule but usually, though not always, requires a symptom-free period longer than 18 months.

Fourth General Rule

The Fourth General Rule is: *It is not possible to conclude that manual labour itself causes or accelerates degenerative disc disease (Decision No. 32*, Ellis). This rule is more important for its exceptions than its application.

In Decision No. 775 (O'Neil), a supermarket cashier had to lift boxes of groceries weighing up to 50 lbs. from the floor to a conveyor belt. Medical literature was cited in this case as tentatively indicating a connection between mechanical strains and degenerative disc disease. Although low level lifting did not qualify as an industrial disease, the Fourth General Rule from *Decision No. 32* was held to be non-applicable.

In *Decision No. 70* (Bradbury), a steel factory worker who felt a tiny bit of pain after an exceptionally heavy night on a fabricating line was compensated. Working in a crouched position as a welder has been held to be disabling so as to qualify the worker for benefits (*Decision No. 62*, Thomas). Extra overtime work has been found to cause disablement (*Decision No. 774/87* Bradbury).

Work as a sewing machine operator has been held, in WCAT *Decision Nos. 72* (Ellis) and *557* (Stewart), to cause disabling pain, thereby qualifying the worker for benefits. However, *Decision Nos. 73/87* (Newman) and *587/87* (Catton) held the opposite. Quaere whether one can also draw conclusions about the proclivities of various WCAT chairmen towards favouring workers or employers, based upon the sewing machine cases.

The Compensation Board follows the Fourth General Rule more closely than does the Appeals Tribunal. In the *Wallbridge* case the Compensation Board refused to recognize truck driving as causing or aggravating degenerative disc disease. In an unreported decision on November 19, 1984, *Wallbridge v. The Workers' Compensation Board*, the Divisional Court of Ontario set aside the Board's decision for reasons of procedural fairness.

SEQUESTRATED DISCS

Fifth General Rule

When it comes to sequestrated discs, also known as herniated discs, bulging discs, ruptured discs, etc., the Appeals Tribunal and the Board adopt an objective anatomical analysis, the Fifth General Rule, rather than the subjective "symptomatic v. asymptomatic" tests which comprise General Rules 1, 2, 3, and the exceptions to Rule 4. This is difficult to understand because, barring a major and severe trauma, a sequestrated disc is a degenerated disc. A flattened orange, and a flattened orange with its pulp poking out the sides, are both crushed oranges. The focus of attention with sequestrated discs is on significant events and leg pain.

In *Decision No. 181* (Catton), it is stated that the relationship between a work accident and a sequestrated disc disability must be more than casual; it must be significant. This Appeals Tribunal view was based on the opinion of Dr. T.A. Wright, Assistant Professor of Surgery at the University of Toronto, that a sequestrated disc can occur by normal wear and tear, and can be aggravated by particular incidents.

In *Decision No. 507* (Bradbury), Dr. W. Harris, an orthopaedic surgeon, was quoted with approval for the following two propositions:

> A) the usual mechanism of disc injury is bending over to pick up a heavy object, less common in jarring;
> B) simple twisting is unlikely to cause disc herniation — twisting while carrying a heavy load is.

Use of rules such as A & B for determining compensability appear far more sensible to this author than the current use of General Rules 1, 2, & 3.

Decision No. 507 (Bradbury) also establishes the useful guideline that if disc herniation is from an accident, then there will be a continuity of leg pain from the date of accident to the recurrence of disability.

DIAGNOSTIC TESTS

No one seems to be clear about the use of diagnostic tests for determining degenerative disc disease & disability. In *Decision No. 17* (Signoroni), x-rays are held to be of limited use in detecting disc injuries. The opposite was found in *Decision No. 70l* (McIntosh-Janis). CT Scans revealing bulging discs were relied on in *Decisions Nos. 747* (Stewart) and *902* (McIntosh-Janis). CT Scans have been found not to be completely

reliable due to over-reading and no objective measures (See Fink, *Compensation Appeals Forum*, Vol. 2 No. 2).

FIBROMYALGIA

Fibromyalgia, a rheumatoid condition causing low back pain, was accepted as a physical disorder resulting from accidents in *Decision Nos. 18* (Ellis) and *647/87* (Stewart), although the character disorder of perfectionist personality is a major contributing factor in this condition (*Decision No. 18*, Ellis p. 31).

CONCLUSION

The loss of time from work due to low back disability among Ontario workers has more than doubled in the past 5 years. Low back disability has been termed an epidemic in North America by various parties such as the Canadian Union of Public Employees. Given no evolutionary changes in the human spine or significant extra-loading in the work environment over the past 5 years, we are more likely dealing with a crisis of "compensability" rather than "incidence". In other words, the number of sore backs from work has not increased in severity or numbers, but the compensation for this disability has become more generous. As with any disease, resources should be directed towards treating the victims rather than "paying them off".

* *Richard Fink is a barrister practicing with the firm of Fink and Bornstein in Toronto.*

Letters to the Editor

Part-time Employer Member Appointments

In reading your letter of June 9th, I am somewhat baffled. If the purpose of recruiting panel members is to obtain the knowledge and judgement of someone familiar with workers' compensation procedures and the appeals mechanisms, I feel you are excluding the most knowledgeable practitioners if those who administer workers' compensation for an employer are deemed to have conflicts.

I have the responsibility for questioning and possibly appealing compensation claims for our organization. If one of our claims is referred to the Appeals Tribunal, I expect I will be involved in the presentation of our case at the hearing. However, I fail to see how I would have a conflict of interest if I served on a panel hearing an appeal in Chatham, Windsor, or London.

I compare the Appeals Tribunal hearing panels to Boards of Arbitration — employer nominees in that case will often be labour lawyers who may, in other instances, provide advice to the employer, or may be other labour relations practitioners who are knowledgeable about the municipal workplace. I cannot comprehend how, or why there is a different standard regarding conflict of interest for the Appeals Tribunal.

I believe, according to your interpretation, that I would have a conflict of interest in this regard — I do not believe this to be the case as I have indicated above. Please clarify for me the reason this conflict of interest guideline was developed in this restrictive manner.

(Name Witheld)

Alternative Chairman's (former) Reponse

Thank you for your letter of July 7, 1987 regarding the Appeals Tribunal's conflict of interest guidelines. I appreciate the points you raise in your letter. The guidelines have the potential for disqualifying good candidates. I agree that they are more stringent than those that are applied to Boards of Arbitration. They may, in fact, be more stringent than those which are used by other Boards and Tribunals.

The Appeals Tribunal was established in October 1985 to replace the W.C.B. Appeal Board. Those of us who set up the Tribunal were concerned from the outset that the Tribunal develop the fairest possible process for adjudicating appeals. An important aspect of fairness is the perception that the adjudicators will assess a case objectively. One of the important ingredients of objectivity is ensuring that adjudicators have no hidden agendas or vested interests that would impair their ability to decide the issue in an unbiased way.

As a result, one of the first committees that was established at the Appeals Tribunal was the Conflict of Interest Committee. The composition of the Committee is tripartite in nature. The Committee's mandate was to look into potential conflict of interest situations and to develop a conflict of interest policy. I was one of the members of that committee.

The most difficult issue we faced is the one to which you make reference in your letter. We certainly recognized the need to find employer and worker representatives who are experienced in workers' compensation matters. However, we recognized a significant difference between the position of a part-time member on a Board of Arbitration and a part-time member at the Appeals Tribunal. The Appeals Tribunal is an organization that adjudicates appeals through tripartite panels appointed by the Lieutenant-Governor-in-Council. A Board of Arbitration is not a specific organization nor are its members appointed by the Lieutenant-Governor-in-Council. It was the view of the Conflict of Interest Committee, and a unanimous view, I might add, that it would be wrong for an adjudicator appointed by the Lieutenant-Governor-in-Council to be a workers' compensation advocate, either before the Appeals Tribunal or before the Worker's Compensation Board. The status of being a Lieutenant-Governor-in-Council appointment would be perceived, in our view, as giving that individual an unfair advantage in appearing before the Appeals Tribunal or the Board. For example, if a Tribunal appointment appeared on behalf of a worker or employer at a W.C.B. Hearings Officer hearing, the other representative might well conclude that more weight would be given to the submissions made by the Tribunal appointment because of that individual's position with the Appeals Tribunal.

In addition, if Tribunal appointments held positions with employer or worker organizations that required them to give strategic or tactical advice on how to present a worker's compensation appeal at the Board or at this Tribunal, there would be a perception that the individual, because of his or her appointment, might well have an "inside track" to the Tribunals decision-making processes.

For these reasons, the Committee adopted the policy with which you disagree. It may interest you to know that in our recent attempt to secure additional part-time appointments, we contracted a number of employer associations and complied a list of

approximately forty potential candidates. We are confident that we will be able to secure from that list a number of additional appointments of individuals who have extensive health and safety or workers' compensation experience and who will be able to adhere to our conflict of interest guidelines.

Thank you for your interest in the Appeals Tribunal. If you wish to discuss this matter with me further, please do not hesitate to call me.

James R. Thomas
Alternative Chairman